



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**RESEARCH REPORT**

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*Bioethics and the case-law of the Court*

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## SUMMARY

For the purposes of this report the term “*bioethics*” has been understood to encompass the protection of the human being (his/her human rights and in particular human dignity) in the context of the development of biomedical sciences. Specific issues arising in relation to this term and which are addressed in the report include reproductive rights (prenatal diagnosis and the right to a legal abortion), medically assisted procreation, assisted suicide, consent to medical examination or treatment, ethical issues concerning HIV, the retention of biological data by the authorities and the right to know one’s biological identity. These complex issues are increasingly being raised before the European Court of Human Rights, and we can perhaps expect more applications concerning subjects such as gene therapy, stem cell research and cloning in the future. The cases cited raise important questions and often highly sensitive issues under Articles 2, 3, 5, 6 – and most often Article 8 – of the European Convention on Human Rights.

Cases updated in the second version of 21 May 2012 are indicated with a double asterisk in bold “\*\*”. Updated cases and new cases which did not appear in the previous reports are indicated with a triple asterisk in bold “\*\*\*”.

References to the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997 (ETS no. 164), and/or the work of the Council of Europe in this area, can be found in a number of cases decided by the European Court of Human Rights.

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## I. EXAMPLES OF CASES IN WHICH BIOETHICAL ISSUES HAVE BEEN RAISED

### A. *Reproductive Rights*

#### (1) Pre-natal diagnosis

***Draon v. France* [GC] (merits), no. 1513/03, judgment of 6 October 2005**  
LIMITATION OF COMPENSATION CLAIMS IN DOMESTIC LAW FOR PARENTS OF CHILDREN WHOSE DISABILITIES WERE UNDETECTED BEFORE BIRTH: VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

It was not disputed that there had been an interference with the right to peaceful enjoyment of a “*possession*” within the meaning of Article 1 of Protocol No. 1 to the Convention. The parties accepted that, having regard to the liability rules under French law at the time of the enactment of the Law of 4 March 2002, and particularly to the settled case-law of the administrative courts which was established by the *Quarez* judgment, the applicants had suffered prejudice caused directly by negligence on the part of *Assistance Publique - Hôpitaux de Paris* (AP-HP) and had a claim in respect of which they could legitimately expect to obtain compensation for damage, including the special burdens arising from their child’s disability.

“82. In the present case, however, section 1 of the Law of 4 March 2002 abolished purely and simply, with retrospective effect, one of the essential heads of damage, relating to very large sums of money, in respect of which the parents of children whose disabilities had not been detected before birth, like the applicants, could have claimed compensation from the hospital held to be liable. The French legislature thereby deprived the applicants of an existing “asset” which they previously possessed, namely an established claim to recovery of damages which they could legitimately expect to be determined in accordance with the decided case-law of the highest courts of the land.

83. The Court cannot accept the Government’s argument that the principle of proportionality was respected, provision having been made for an appropriate amount of compensation, which would thus constitute a satisfactory alternative, to be paid to the applicants. It does not consider that what the applicants could receive by virtue of the Law of 4 March 2002 as the sole form of compensation for the special burdens arising from the disability of their child was, or is, capable of providing them with payment of an amount reasonably related to the value of their lost asset. The applicants are admittedly entitled to benefits under the system now in force, but the amount concerned is considerably less than the sum payable under the previous liability rules and is clearly inadequate, as the Government and the legislature themselves admit, since these benefits were extended recently by new provisions introduced for that purpose by the Law of 11 February 2005. Moreover, neither the sums to be paid to the applicants under that law nor the date of its entry into force for disabled children have been definitively fixed (see paragraphs 56 to 58 above). That situation leaves the applicants, even now, in considerable uncertainty, and in any event prevents them from obtaining sufficient compensation for the damage they have already sustained since the birth of their child.

Thus, both the very limited nature of the existing compensation payable by way of national solidarity and the uncertainty surrounding the compensation which might result from application of the 2005 Act rule out the conclusion that this important head of damage may be regarded as having been reasonably compensated in the period since enactment of the Law of 4 March 2002.

84. As regards the compensation awarded to the applicants by the Paris Administrative Court to date, the Court notes that it covers non-pecuniary damage and disruption to the applicants' lives, but not the special burdens arising from the child's disability throughout his life. On this point, the Court is led to the inescapable conclusion that the amount of compensation awarded by the Paris Administrative Court was very much lower than the applicants could legitimately have expected and that, in any case, it cannot be considered to have been definitively secured, since the award was made in a first-instance judgment against which an appeal is pending. The compensation thus awarded to the applicants cannot therefore compensate for the claims now lost.

85. Lastly, the Court considers that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service mentioned by the *Conseil d'Etat* in its opinion of 6 December 2002 and relied on by the Government could not, in the instant case, legitimise retrospective action whose result was to deprive the applicants, without sufficient compensation, of a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden.

Such a radical interference with the applicants' rights upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other.

86. In so far as it concerned proceedings pending on 7 March 2002, the date of its entry into force, section 1 of the Law of 4 March 2002 therefore breached Article 1 of Protocol No. 1 to the Convention<sup>1</sup>."

**\*\*\*[A.K. v. Latvia](#), no. 33011/08, judgment of 24 June 2014**

ALLEGED FAILURE TO REFER PATIENT FOR AN ANTENATAL SCREENING TEST AND INADEQUATE JUDICIAL SCRUTINY IN CIVIL PROCEEDINGS: VIOLATION OF ARTICLE 8 IN ITS PROCEDURAL LIMB

The applicant, who was forty years old at the relevant time and had two children, alleged that during her pregnancy her doctor did not refer her for an alpha-fetoprotein ("AFP") test, the antenatal screening test. Subsequently, she gave birth to a daughter suffering from Down's syndrome. The domestic law provided that all women over the age of thirty-five should have an AFP test. The applicant was denied any compensation in civil proceedings.

Under Article 8, the applicant complained of the denial of adequate and timely medical care in the form of an antenatal screening test due to the negligence of her doctor. This test would have indicated the risk of her

<sup>1</sup>. See also: *Maurice v. France* (merits) [GC], no. 11810/03; judgment of 6 October 2005 - Similar case to the above.



foetus having a genetic disorder and would have allowed her to choose whether to continue the pregnancy.

While noting the significant margin of appreciation enjoyed by member States in this sensitive area, the Court first assessed the procedural rights of the applicant under Article 8 in respect of the civil proceedings. It observed several shortcomings that had not been clarified by the domestic courts:

- (i) factual discrepancies in the judgments concerning issues such as the failure to assign the applicant to a risk category;
- (ii) discrepancies in medical records as to the time of the alleged referral of the applicant for an AFP test;
- (iii) disappearance of the applicant's medical records for a number of months during the criminal investigation;
- (iv) lack of reaction on the part of the applicant's doctor to her absence from the alleged test appointment; and
- (v) lack of judicial assessment of the applicant's right to compensation in respect of non-pecuniary damage.

Taking into account all those circumstances, the Court found that the domestic court had conducted the proceedings in an arbitrary manner and had failed to examine the applicant's claim properly. There had therefore been a violation of Article 8 in its procedural aspect.

(2) Right to a legal abortion

\*\*\**Bosso v. Italy*, no. 50490/99, decision of 5 September 2002  
 FAILURE TO TAKE INTO ACCOUNT THE OPPOSITION OF THE PRESUMED FATHER WHEN  
 AFFORDING A WOMAN THE POSSIBILITY OF AN ABORTION: INADMISSIBLE

The applicant's wife terminated her pregnancy against the presumed father's will. Italian law allowed a woman to terminate her pregnancy in specified circumstances and did not involve the presumed father in the decision-making process.

The applicant complained under Articles 2 and 8 that the law enabled women to take decisions on abortions on their own and did not take into account the presumed father's opinion.

Given the degree to which the applicant was affected by the termination of his wife's pregnancy, the Court recognised his status as a victim. It examined whether Italian law struck a fair balance between the competing interests of the protection of the foetus and of the woman. Since the law allowed for termination of a pregnancy within the first twelve weeks where there was a risk to the woman's physical and mental health and later only in case of risk to the woman's life or to the condition of the child, the Court did not find that the respondent State had overstepped its margin of discretion in such a sensitive area. The Court rejected the complaint as

being manifestly ill-founded since the abortion in the particular case had been conducted in accordance with the law.

It also rejected the applicant's complaint under Article 8, holding that "*any interpretation of a potential father's rights ... when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination*".

**D. v. Ireland, no. 26499/02, decision of 27 June 2006**

LACK OF AVAILABILITY OF ABORTION IN IRELAND IN THE CASE OF FATAL FOETAL ABNORMALITY: INADMISSIBLE

In late 2001, D. – who already had two children – became pregnant with twins. In early 2002 an amniocentesis indicated that one foetus had died in the womb and that the second foetus had a chromosomal abnormality known as Trisomy 18 or Edward's Syndrome. A second amniocentesis confirmed those findings. D. was given to understand that Edward's Syndrome was fatal and that the median survival age for children with the syndrome was six days. She therefore decided that she would not carry the pregnancy to term.

D. went to the United Kingdom for an abortion. She did not seek legal advice as to her eligibility for an abortion in Ireland. At that time, the only recognised exception to the constitutional prohibition of abortion was "*a real and substantial risk to the life of the mother*" including the risk of suicide: this exception was established in *Attorney General v. X* (1992), in which a 14-year-old pregnant girl who had been raped threatened to commit suicide if denied an abortion.

The abortion was performed in the United Kingdom. D. could not remain in the United Kingdom afterwards and could not therefore take advantage of counselling concerning the genetic implications for future pregnancies, amongst other questions, although she was given some statistical information about the recurrence of the abnormality. The applicant needed to obtain follow-up medical treatment in Ireland and told the hospital and her own family doctor that she had had a miscarriage.

The applicant complained about the non-availability of abortion services in Ireland in cases of lethal foetal abnormality, a situation unnecessarily exacerbated by the Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995. Sections 5 and 8 of the 1995 Act limit what a doctor can tell a pregnant woman with a lethal foetal abnormality and prohibit that doctor from making proper arrangements, or a full referral, for a therapeutic abortion abroad. She also complained that she had been discriminated against as a pregnant woman or as a pregnant woman with a lethal foetal abnormality.

She relied on Articles 1 (obligation to respect human rights), 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for

private and family life), 10 (right to receive information), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention.

The Court concluded that there was a constitutional remedy available to the applicant in principle, although some uncertainty attached to three relevant matters arising from the novelty of the substantive issue and the procedural imperatives of the applicant's position – the chances of success, the limited time available to conclude the proceedings (the applicant had only six weeks left before the expiry of the 24-week period in which abortion was normally available in the UK) and the guarantees that her identity would be kept confidential.

However, the Court was of the view that, taking into consideration the potential availability and importance of the constitutional remedy in a common law system, especially concerning the issue in question, the applicant could reasonably have been expected to take certain preliminary steps. She should have obtained legal advice on those substantive and procedural uncertainties and issued a Plenary Summons allowing her to apply for an urgent, preliminary and in camera hearing to obtain the High Court's response to her timing and publicity concerns. It was true that during those steps it had been assumed that the applicant would continue an already advanced pregnancy. However, the Court was satisfied on the evidence that such preliminary steps could have been completed without disclosing the applicant's identity and in a matter of days and that the evolution of those initial steps would have elucidated some of the uncertainties and allowed her to assess the effectiveness of the remedy in her situation as the days went by. In the absence of those preliminary steps, the Court was unable to dismiss as ineffective the constitutional remedy available in principle to the applicant.

The Court therefore concluded that the applicant did not comply with the requirement to exhaust domestic remedies as regards the availability of abortion in Ireland in the case of fatal foetal abnormality.

The Court further noted that the limitations of the 1995 Act, about which the applicant complained also under Articles 3, 8 and 10, concerned abortion services abroad and had no application to a lawful abortion in Ireland. Consequently, the applicant's failure to pursue domestic remedies as regards obtaining a lawful abortion in Ireland meant that her complaints about the 1995 Act, together with her associated complaints under Article 13 and 14, also had to be rejected on the grounds of a failure to exhaust domestic remedies.

***Tysi c v. Poland, no. 5410/03, judgment of 20 March 2007***

LIMITATION ON LEGAL ABORTION AND SEVERE HARM TO A MOTHER'S HEALTH CAUSED BY PREGNANCY: VIOLATION OF ARTICLE 8

“65. (...) The failure of the State to make a legal abortion possible in circumstances which threatened the applicant's health, and to put in place the procedural mechanism

necessary to allow her to have this right realised, meant that the applicant was forced to continue with a pregnancy for six months knowing that she would be nearly blind by the time she gave birth. The resultant anguish and distress and the subsequent devastating effect of the loss of her sight on her life and that of her family could not be overstated. She had been a young woman with a young family already grappling with poor sight and knowing that her pregnancy would ruin her remaining ability to see. As predicted by her doctor in April 2000, her sight has severely deteriorated, causing her immense personal hardship and psychological distress.

66. The Court reiterates its case-law on the notion of ill-treatment and the circumstances in which the responsibility of a Contracting State may be engaged, including under Article 3 of the Convention by reason of the failure to provide appropriate medical treatment (see, among other authorities, *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII, *mutatis mutandis*). In the circumstances of the instant case, the Court finds that the facts alleged do not disclose a breach of Article 3. The Court further considers that the applicant's complaints are more appropriately examined under Article 8 of the Convention.

...

77. As to the first limb of this complaint, the applicant argued that the very special facts of this case had given rise to a violation of Article 8. She had been seeking to have an abortion in the face of a risk to her health. The refusal to terminate the pregnancy had exposed her to a serious health risk and amounted to a violation of her right to respect for her private life.

...

112. The Court observes that the notion of “respect” is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; *Carbonara and Ventura v. Italy*, no. 24638/94, § 63, ECHR 2000-VI; and *Capital Bank AD v. Bulgaria*, no. 49429/99, § 133, ECHR 2005-XII (extracts)). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67 and, more recently, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000-XI).

113. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis*

*mutandis, Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII).

114. When examining the circumstances of the present case, the Court must have regard to its general context. It notes that the 1993 Act prohibits abortion in Poland, providing only for certain exceptions. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment ... According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular in the absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case.

...

124. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.

...

128. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion...

130. The Court concludes that there has been a breach of Article 8 of the Convention."

**\*\*A, B, and C v. Ireland [GC], no. 25579/05, judgment of 16 December 2010**

RESTRICTION ON OBTAINING AN ABORTION: VIOLATION OF ARTICLE 8 IN RESPECT OF THE THIRD APPLICANT ONLY

The applicants, three women who live in Ireland, two Irish nationals and one Lithuanian national, travelled to the UK in 2005 to have abortions after becoming pregnant unintentionally.

The first applicant, unmarried and unemployed, paid for the abortion in a private clinic in the UK by borrowing money from a money lender. The second applicant was not prepared to become a single parent and decided to travel to the UK for an abortion. The third applicant believed that there was a risk that her pregnancy would cause a recurrence of her cancer and therefore decided to have an abortion in England. In Irish law, abortion is prohibited under criminal law and any pregnant woman, or any third party, who undertakes any unlawful action with the intent to provoke a woman's miscarriage is guilty of a crime which carries a penalty of life imprisonment. The Supreme Court held in 1992 that abortion was lawful in Ireland if there was a real and substantial risk to the life, as distinct from the health, of the mother as a result of her pregnancy.

The applicants complained that the impossibility for them to have an abortion in Ireland made the procedure unnecessarily expensive, complicated and traumatic. The third applicant relied on Article 2 of the Convention and all three applicants relied on Article 3 of the Convention. The first and the second applicant complained under Article 8 about the restrictions on lawful abortion in Ireland and the third applicant complained under that Article about the absence in Ireland of laws implementing the Constitutional provision acknowledging the right to life of the future mother. Furthermore, the restriction placed an excessive burden, in breach of Article 14, on the applicants – and particularly on the first applicant – as women whose financial means were extremely limited.

The Court observed that there had been no legal obstacle to any of the applicants travelling abroad for an abortion. Given that the third applicant had not claimed that post-abortion complications had represented a threat to her life, the Court rejected her complaints as inadmissible. The Court rejected all three applicants' complaints under Article 3. It found that the psychological and physical burden had not been sufficiently grave to represent inhuman or degrading treatment as prohibited under Article 3. The Court examined the complaints of the first and second applicant under Article 8 separately from those of the third applicant. The Court found that the prohibition on the termination of the first and second applicants' pregnancies had represented an interference with their right to respect for their private lives. However, the undisputed consensus among the Council of Europe member States was not sufficient to narrow decisively the broad margin of appreciation the State enjoyed in that context. As regards the right to travel abroad to obtain an abortion and to appropriate pre- and post-abortion medical care in Ireland, the Court concluded that the existing prohibition on abortion in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn and that there had been no violation of Article 8 as regards the first and the second applicants. The Court furthermore concluded that Ireland had breached the right to respect the private life of the third applicant, who had a rare form of cancer, and there had been the violation of Article 8.

**\*\*[R.R. v. Poland](#), no. 27617/04, judgment of 26 May 2011**

**"INHUMAN TREATMENT" OF MOTHER DENIED TIMELY ACCESS TO AMNIOCENTESIS WHOSE BABY WAS BORN SEVERELY DISABLED: VIOLATION OF ARTICLES 3 AND 8**

The applicant complained that she was not allowed to have access to the prenatal genetic examination to which she was entitled when she was pregnant due to the doctors' lack of proper counselling, procrastination and confusion. The doctors also refused to perform an abortion. The applicant gave birth in July 2003 to a baby suffering from Turner syndrome. The applicant relied in her complaint on Articles 3 (prohibition of inhuman and

degrading treatment), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the Convention.

The Court noted that the applicant had received insufficient compensation from the Polish courts and had not lost her status as a victim. Shabbily treated by the doctors dealing with her case, the applicant had been humiliated. The Court agreed that there had been a violation of Article 3. It mentioned that the State enjoys a wide margin of appreciation “*as regards the circumstances in which an abortion will be permitted*” (see R.R. v. Poland, no. 27617/04, § 187). In R.R.’s case, what was at stake was essentially timely access to a medical diagnostic service that would, in turn, make it possible to determine whether or not the conditions for lawful abortion had been met. The Court concluded that the Polish authorities had failed to comply with their obligations to ensure the effective respect for the applicant’s private life and that there had therefore been a violation of Articles 3 and 8 of the Convention. The Court held unanimously that no separate issue arose under Article 13.

**\*\*\**P. and S. v. Poland*, no. 57375/08, judgment of 30 October 2012**  
 “*INHUMAN TREATMENT*” OF A 14-YEAR-OLD GIRL WHO BECAME PREGNANT AS A RESULT OF A RAPE: VIOLATION OF ARTICLES 3, 5 AND 8

The application was lodged by P. and her mother. P. was fourteen years old in 2008 when she was raped by a classmate and became pregnant as a result. The 1993 Law on Family Planning provided for very few grounds on which abortion in Poland was legal: when the pregnancy threatened the life or health of the pregnant woman, when there was a high risk of severe foetal impairment, and when there were strong reasons for believing that the pregnancy was the result of a criminal act. In accordance with the law, P. obtained a certificate from the public prosecutor attesting that she could have an abortion because she was only fourteen and sexual intercourse with minors below the age of fifteen was a crime. However, her access to the abortion was severely hampered. Moreover, the hospital disclosed to the general public the information that it was treating a pregnant minor. P. was harassed by anti-abortion activists and exposed to journalists. She was subsequently placed in juvenile sheltered accommodation as an interim measure ordered by the court. When P. finally obtained a legal abortion following an intervention from the Ministry of Health, it happened in a clandestine manner. P. was not registered as a patient and received no post-abortion care.

Having considered the circumstances of the case seen as a whole, in particular the first applicant’s extreme vulnerability and young age, the Court ruled that Poland had violated Article 3 of the Convention in her regard. She was treated in a deplorable manner by the authorities and her suffering attained the required minimum threshold of severity. The judgment went on to note that the Court had been particularly struck that the



authorities had started criminal proceedings for illicit sexual relations against the adolescent who, according to the prosecutor and medical reports, should have been considered the victim of sexual abuse (§ 165).

A violation of Article 5 was also found. The Court held in particular that the essential purpose of P.'s placement in juvenile sheltered accommodation had been to separate her from her parents and to prevent the abortion. Less drastic measures than locking up a fourteen-year-old girl should have – but had not – been considered by the courts.

Finally, the Court found a double violation of Article 8 as regards the determination of access to lawful abortion in respect of both applicants and as regards the disclosure of the applicants' personal data.

**\*\*\**Z v. Poland*, no. 46132/08, judgment of 13 November 2012**

DEATH OF A WOMAN THROUGH SEPTIC SHOCK AFTER THE DOCTOR'S ALLEGED FAILURE TO PROVIDE HER WITH ADEQUATE MEDICAL TREATMENT: NO VIOLATION OF ARTICLE 2 IN ITS PROCEDURAL LIMB

The applicant's daughter developed ulcerative colitis early on in her pregnancy and was admitted to a number of hospitals before her condition was diagnosed. Certain examinations (including a second endoscopy and a colonoscopy) which would have made it possible to gather more information on the location and extent of the problem were not carried out. One doctor refused to perform a full endoscopy, stating that "*my conscience does not allow me*". The applicant's daughter lost the foetus and then died two weeks later herself as a result of septic shock caused by sepsis. Section 39 of the Medical Profession Act provides that a doctor may refuse to carry out a medical service, on the basis of invoking his or her objections for reasons of conscience.

Relying in particular on Article 2 of the Convention, the applicant complained that the doctors treating her daughter had failed to provide her with adequate treatment and that no effective investigation had been conducted which would have allowed the authorities to establish responsibility for her daughter's death. Lastly, she maintained that the State had failed to adopt a legal framework that would have prevented the death of her daughter, specifically challenging the manner in which the law governing conscientious objection was regulated and overseen.

The Court considered that the investigation had succeeded in elucidating the circumstances which were relevant to the issue of determining any responsibility on the part of the medical personnel for the death of the applicant's daughter. It did not find any grounds to contest the findings of the investigation. The domestic authorities had therefore dealt with the applicant's claim arising out of her daughter's death with the level of diligence required by Article 2 and there had been no violation of that provision in its procedural aspect. Finally, the Court held that it was not



established that this was a case of conscientious objection and did not examine the applicant's complaints above the legislative framework.

(3) Right to give birth at home

**\*\*\*[Ternovszky v Hungary](#), no. 67545/09, judgment of 14 December 2010**  
 NO POSITIVE RIGHT TO GIVE BIRTH AT HOME WITH THE INVOLVEMENT OF HEALTH PROFESSIONALS: VIOLATION OF ARTICLE 8

The applicant intended to give birth at her home, rather than in a hospital or a maternity clinic. She complained that the ambiguous legislation on home births dissuaded health professionals from assisting her when giving birth at home, which amounted to a discriminatory interference with her right to respect for her private life. She relied on Article 8 read in conjunction with Article 14 of the Convention.

Examining the case under Article 8 alone, the Court firstly found that the right of decision to become a parent included the right to choose the circumstances of becoming a parent and confirmed therefore that the contested legislation constituted an interference with the right to respect for the applicant's private life.

The Court considered that, where choices concerning the exercise of the right to respect for private life arose in a legally regulated area, the State should provide adequate legal protection of that right within the regulatory scheme, in particular by ensuring that the law was accessible and foreseeable, enabling individuals to regulate their conduct accordingly. The State had a wide margin of appreciation in that regard. However, "*in the context of home birth, regarded as a matter of personal choice of the mother, this implies that the mother is entitled to a legal and institutional environment that enables her choice, except where other rights render necessary the restriction thereof.*"

The Court found a violation of Article 8 on account of the unlawful interference, holding that "*the matter of health professionals assisting home births is surrounded by legal uncertainty prone to arbitrariness*" (§ 26). The lack of legal certainty and the threat to health professionals had thus limited the applicant's choices as regards home birth.

**\*\*\*Pending cases:**

**\*\*\*[Dubská and Krejzová v. Czech Republic](#), nos. 28859/11 and 28473/12, Chamber judgment of 11 December 2014, case pending before the Grand Chamber**

PROHIBITION OF THE ATTENDANCE OF HEALTH PROFESSIONALS AT HOME BIRTHS: NO VIOLATION OF ARTICLE 8

Two Czech women, Ms Dubská and Ms Krejzová, sought midwives to assist them in giving birth at home. However, under Czech law health professionals are not allowed to assist with home births, and providing care outside a medical institution is unlawful. The first applicant eventually gave

birth to her child alone at home and the second applicant gave birth to her child in a maternity hospital. The applicants complained under Article 8 of the Convention that mothers had no choice but to give birth in a hospital if they wished to be assisted by a health professional.

The Chamber found no violation of the Convention. It considered that “*giving birth is a particularly intimate aspect of a mother’s private life. It encompasses issues of physical and psychological integrity, medical intervention, reproductive health and the protection of health-related information. Decisions regarding the circumstances of giving birth, including the choice of the place of birth, therefore fall within the scope of the mother’s private life for the purposes of Article 8*” (§ 75).

As the Chamber recognised, this law effectively amounted to a ban on midwives attending women at home. This interfered with the applicants’ right to respect for their private lives, but such interference had a legal basis – even though “*there might be certain doubts concerning the clarity of the legislative provisions in force*” – and could be seen as serving the legitimate aim of the protection of health and of the rights of others (§ 83).

The Contracting State in question was to be given a wide margin of appreciation in matters involving health care policy and scientific data concerning the relative risks of hospital and home births, and the allocation of financial resources. The Chamber considered it relevant that: (i) there was no European consensus on the matter, and (ii) the mothers concerned had not had to bear a disproportionate and excessive burden by reason of the fact that they could obtain the assistance of a health professional only if they opted for a hospital birth.

The Chamber nevertheless encouraged the State authorities to keep the relevant legal provisions under constant review in the light of medical, scientific and legal developments.

**\*\*\*[Kosaitė - Čypienė and others v. Lithuania](#), no. 69489/12, communicated on 20 December 2012**

The four applicants wanted to give birth, or had given birth, at home. In the latter case, they had sought the assistance of an unlicensed midwife. The latter was under criminal investigation at that point, as was a gynaecologist who would in principle have been willing to assist the applicants at home, and both of them were therefore unable to attend any home births.

The applicants complain under Articles 2 and 8 of the Convention because it is not possible to obtain adequate professional assistance for home births in view of domestic legislation.

**[Pojatina v. Croatia](#), no. 18568/12, communicated on 16 February 2015**

In November 2011 the applicant, who was pregnant at the time, asked the Croatian Chamber of Midwives about the possibility of medical assistance for a home birth. The latter declined to assist in her planned home birth.

The applicant complains under Articles 8 and 13 that Croatian law dissuades health professionals from assisting at home births.

### ***B. Medically assisted procreation***

***Evans v. the United Kingdom [GC], no. 6339/05, judgment of 10 April 2007***

IMPOSSIBILITY FOR THE APPLICANT TO HAVE IVF TREATMENT DUE TO THE WITHDRAWAL OF HER EX-PARTNER'S CONSENT TO IMPLANT THE EMBRYOS CREATED JOINTLY BY THEM: NO VIOLATION OF ARTICLES 2, 8 AND 14

The applicant, who was suffering from ovarian cancer, underwent *in vitro* fertilisation treatment (hereafter "IVF") with her then partner before having her ovaries removed. Six embryos were created and placed in storage. When the couple's relationship ended, her ex-partner withdrew his consent for the embryos to be used, not wanting to be the genetic parent of the applicant's child. National law consequently required that the eggs be destroyed. The applicant complained that domestic law permitted her former partner effectively to withdraw his consent to the storage and use by her of embryos created jointly by them, preventing her from ever having a child to whom she would be genetically related.

#### **"The margin of appreciation**

81. In conclusion, therefore, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see *X., Y. and Z.*, cited above, § 44).

82. The Grand Chamber, like the Chamber, considers that the above margin must in principle extend both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests.

#### **Compliance with Article 8**

83. It remains for the Court to determine whether, in the special circumstances of the case, the application of a law which permitted J effectively to withdraw or withhold his consent to the implantation in the applicant's uterus of the embryos created jointly by them struck a fair balance between the competing interests.

84. The fact that it is now technically possible to keep human embryos in frozen storage gives rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which may be substantial, to intervene between creation of the embryo and its implantation in the uterus. The Court considers that it is legitimate – and indeed desirable – for a State to set up a legal scheme which takes this possibility of delay into account. In the United Kingdom, the solution adopted in the 1990 Act was to permit storage of embryos for a maximum of five years. In 1996 this period was extended by secondary legislation to ten or more years where one of the gamete providers or the prospective mother is, or

is likely to become, prematurely infertile, although storage can never continue after the woman being treated reaches the age of 55 (see paragraph 36 above).

85. These provisions are complemented by a requirement on the clinic providing the treatment to obtain a prior written consent from each gamete provider, specifying, *inter alia*, the type of treatment for which the embryo is to be used (Schedule 3, paragraph 2(1) to the 1990 Act), the maximum period of storage, and what is to be done with it in the event of the gamete provider's death or incapacity (Schedule 3, paragraph 2(2)). Moreover, paragraph 4 of Schedule 3 provides that "the terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo ..." up until the point that the embryo has been "used" (that is, implanted in the uterus; see paragraph 37 above). Other States, with different religious, social and political cultures, have adopted different solutions to the technical possibility of delay between fertilisation and implantation (see paragraphs 39-42 above). For the reasons set out above (paragraphs 77-82), the decision as to the principles and policies to be applied in this sensitive field must, primarily, be for each State to determine.

86. In this connection the Grand Chamber agrees with the Chamber that it is relevant that the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate (see, *mutatis mutandis*, *Hatton and others v. the United Kingdom* [GC], no. 36022/97, § 128, ECHR 2003-VIII).

87. The potential problems arising from scientific progress in storing human embryos were addressed as early as the Warnock Committee's Report of 1984, which recommended that a couple should be permitted to store embryos for their own future use for a maximum of ten years, after which time the right of use or disposal should pass to the storage authority. In the event that a couple failed to agree how the shared embryo should be used, the right to determine the use or disposal of the embryo should pass to the "storage authority". The subsequent Green Paper specifically asked interested members of the public what should happen where there was no agreement between a couple as to the use or disposal of an embryo, and the 1987 White Paper noted that those respondents who agreed that storage should be permitted were broadly in favour of the Committee's recommendations, but that some rejected the idea that the "storage authority" should be empowered to decide the embryo's fate in the event of conflict between the donors. The Government therefore proposed "that the law should be based on the clear principle that the donor's wishes are paramount during the period in which embryos or gametes may be stored; and that after the expiry of this period, they may only be used by the licence holder for other purposes if the donor's consent has been given to this". The White Paper also set out the detail of the proposals on consent, in a form which, after further consultation, was adopted by the legislature in Schedule 3 to the 1990 Act (see paragraphs 29-33 above).

88. That Schedule places a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing (see paragraph 37 above). It is undisputed that this occurred in the present case, and that the applicant and J both signed the consent forms required by the law. While the pressing nature of the applicant's medical condition required her to make a decision quickly and under extreme stress, she knew, when consenting to have all her eggs fertilised with J's sperm, that these would be the last eggs available to her, that it would be some time before her cancer treatment was

completed and any embryos could be implanted, and that, as a matter of law, J would be free to withdraw consent to implantation at any moment.

89. While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the Court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with Article 8 (see also the *Pretty* and *Odièvre* cases cited in paragraph 60 above). Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what the Court of Appeal described as "entirely incommensurable" interests (see paragraphs 25-26 above). In the Court's view, these general interests pursued by the legislation are legitimate and consistent with Article 8.

90. As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else. However, given the above considerations, including the lack of any European consensus on this point (see paragraph 79 above), it does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J's right to respect for his decision not to have a genetically-related child with her.

91. The Court accepts that it would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.

92. The Grand Chamber considers that, given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention."

***Dickson v. the United Kingdom* [GC], no. 44362/04, judgment of 4 December 2007**

REFUSAL OF DOMESTIC AUTHORITIES TO GRANT PRISONER'S REQUEST FOR ARTIFICIAL INSEMINATION: VIOLATION OF ARTICLE 8

The applicant, a prisoner with a minimum 15-year sentence to serve for murder, was refused access to artificial insemination facilities to enable him to have a child with his wife, who – being born in 1958 and also in prison – would have little chance of conceiving after his release.

**“Applicability of Article 8**

65. The restriction at issue in the present case concerned the refusal to the applicants of facilities for artificial insemination. The parties did not dispute the applicability of Article 8, although before the Grand Chamber the Government appeared to suggest that Article 8 might not apply in certain circumstances: where, for

example, a prisoner's sentence was so long that there was no expectation of ever "taking part" in the life of any child conceived and Article 8 did not guarantee a right to procreate.

66. The Court considers that Article 8 is applicable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives which notions incorporate the right to respect for their decision to become genetic parents (the above-cited cases of *E.L.H. and P.B.H. v. the United Kingdom*, *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR 2001-XI; *Aliev v. Ukraine*, no. 41220/98, §§ 187-189, 29 April 2003; and *Evans v. the United Kingdom* [GC], no. 6339/05, §§ 71-72, 10 April 2007).

...

68. Accordingly, a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, *inter alia*, from the necessary and inevitable consequences of imprisonment (§ 27 of the Chamber judgment) or (as accepted by the applicants before the Grand Chamber) from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion.

...

#### **The conflicting individual and public interests**

75. ... The Court, as the Chamber, reiterates that there is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion (*Hirst*, cited above § 70). However, the Court could accept, as did the Chamber, that the maintaining of public confidence in the penal system has a role to play in the development of penal policy. The Government also appeared to maintain that the restriction, of itself, contributed to the overall punitive objective of imprisonment. However, and while accepting that punishment remains one of the aims of imprisonment, the Court would also underline the evolution in European penal policy towards the increasing relative importance of the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence (see paragraphs 28-36 above).

76. ... The Court is prepared to accept as legitimate, for the purposes of the second paragraph of Article 8, that the authorities, when developing and applying the Policy, should concern themselves, as a matter of principle, with the welfare of any child: conception of a child was the very object of the exercise. Moreover, the State has a positive obligations to ensure the effective protection of children (*L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-III, § 36; *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports 1998-VIII, § 115-116; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). However, that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released.

...

#### **Balancing the conflicting interests and the margin of appreciation**

80. In the present case, the parties disputed the breadth of the margin of appreciation to be accorded to the authorities. The applicants suggested that the

margin had no role to play since the Policy had never been subjected to parliamentary scrutiny and allowed for no real proportionality examination. The Government maintained that a wide margin of appreciation applied given the positive obligation context, since the Policy was not a blanket one and since there was no European consensus on the subject.

81. The Court notes, as to the European consensus argument, that the Chamber established that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination. However, while the Court has expressed its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits (see the above-cited *Aliev* judgment, at § 188). Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

82. However, and even assuming that the judgment of the Court of Appeal in the *Mellor* case amounted to judicial consideration of the Policy under Article 8 (despite its pre-incorporation and judicial review context, see paragraphs 23-26 above), the Court considers that the Policy as structured effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case.

In particular, and having regard to the judgment of Lord Phillips MR in the *Mellor* case and of Auld LJ in the present case, the Policy placed an inordinately high “exceptionality” burden on the applicants when requesting artificial insemination facilities (see paragraphs 13, 15-17 and 23-26 above). They had to demonstrate, in the first place, as a condition precedent to the application of the Policy, that the deprivation of artificial insemination facilities might prevent conception altogether (the “starting point”). Secondly, and of even greater significance, they had to go on to demonstrate that the circumstances of their case were “exceptional” within the meaning of the remaining criteria of the Policy (“the finishing point”). The Court considers that even if the applicants’ Article 8 complaint was before the Secretary of State and the Court of Appeal, the Policy set the threshold so high against them from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic courts in their case, as required by the Convention (see, *mutatis mutandis*, *Smith and Grady*, cited above § 138).

83. In addition, there is no evidence that, when fixing the Policy the Secretary of State sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction. Further, since the Policy was not embodied in primary legislation, the various competing interests were never weighed, nor were issues of proportionality ever assessed, by Parliament (see the above-cited judgments in *Hirst*, § 79, and *Evans*, §§ 86-89). Indeed, the Policy was adopted, as noted in the judgment of the Court of Appeal in the *Mellor* case (see paragraph 23 above), prior to the incorporation of the Convention into domestic law.

84. The Policy may not amount to a blanket ban such as was at issue in the *Hirst* case since in principle any prisoner could apply and, as demonstrated by the statistics submitted by the Government, three couples did so successfully. Whatever the precise reason for the dearth of applications for such facilities and the refusal of the majority of the few requests maintained, the Court does not consider that the statistics provided

by the Government undermine the above finding that the Policy did not permit the required proportionality assessment in an individual case. Neither was it persuasive to argue, as the Government did, that the starting point of exceptionality was reasonable since only a few persons would be affected, implying as it did the possibility of justifying the restriction of the applicants' Convention rights by the minimal number of persons adversely affected.

85. The Court therefore finds that the absence of such an assessment as regards a matter of significant importance for the applicants (see paragraph 72 above) must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved. There has, accordingly, been a violation of Article 8 of the Convention."

**\*\**S.H and Others v. Austria* [GC], no. 57813/00, judgment of 3 November 2011**

LAWFULNESS OF CERTAIN MEDICALLY ASSISTED PROCREATION TECHNIQUES: NO VIOLATION OF ARTICLE 8

The applicants, two married couples from Austria, wished to use medically-assisted procreation techniques which are not allowed under Austrian law. One couple needed the use of sperm from a donor and the other couple ova that had been donated. The Austrian Artificial Procreation Act prohibits the use of sperm from a donor for *in vitro* fertilisation ("IVF") and ova donation in general. At the same time, the Act allows other assisted procreation techniques, in particular IVF with ova and sperm from the spouses or cohabitating partners themselves and, in exceptional circumstances, donation of sperm when it is introduced into the reproductive organs of a woman.

The applicants complained that the prohibition of sperm and ova donation for *in vitro* fertilisation violated their right to respect for family life under Article 8 of the Convention, and that the difference in treatment compared to couples who wished to use medically-assisted procreation techniques, but did not need to use ova and sperm donation for *in vitro* fertilisation, amounted to discriminatory treatment, in violation of Article 14 of the Convention.

In its Chamber judgment of 1 April 2010 the Court held that there had been a violation of Article 14 in conjunction with Article 8 of the Convention. On 4 October 2010 the case was referred to the Grand Chamber at the Austrian Government's request.

The Grand Chamber overturned the Chamber's judgment and decided that the margin of appreciation to be given to Austria had to be a wide one, given that the use of *in vitro* fertilisation treatment gave rise to sensitive ethical issues against a background of fast-moving scientific developments. The Court concluded that Austria had not exceeded the margin of appreciation afforded to it and there had been no violation of Article 8 of the Convention. The Court also underlined that the field of artificial



procreation, being susceptible to particularly dynamic development both in science and in law, had to be kept under review by the member States.

**\*\*\**Knecht v. Romania*, no. 10048/10, judgment of 2 October 2012**

RETRIEVAL OF EMBRYOS SEIZED BY THE STATE AUTHORITIES: NO VIOLATION OF ARTICLE 8

The applicant was a German-American national who had had her embryos stored at a Romanian fertility clinic. Following a criminal investigation into the clinic, the embryos were transferred to the Institute of Forensic Medicine. However, this institute was not authorised to function as a gene bank. The applicant submitted that she had been prevented from progressing with her planned IVF treatment because the Romanian authorities had refused to transfer the embryos to a licensed clinic. She alleged that her Article 8 rights had been breached.

Finding that the applicant's "*private life*" was at stake in this case since she had been prevented from using her embryos by the State authorities, the Court nonetheless held that there had been no violation of the applicant's rights. In the course of the domestic proceedings, the Romanian courts ordered the transfer of the embryos to a specialist and authorised clinic. The Court considered that it had not been provided with sufficient evidence that the applicant would have been unable to have her interest accommodated in relation to the desired IVF procedure in that clinic.

**\*\*\**Costa and Pavan v. Italy*, no. 54270/10, judgment of 28 August 2012**

NO ACCESS TO PREIMPLANTATION GENETIC DIAGNOSIS FOR THE PURPOSES OF SELECTING AN EMBRYO: VIOLATION OF ARTICLE 8

The applicants, an Italian couple, are healthy carriers of the genetic disease cystic fibrosis. They discovered this in 2006 on the occasion of the birth of their daughter, who was born with that disease.

The second pregnancy of the first applicant was terminated in 2010 on medical grounds at the request of the applicants. The prenatal test confirmed that the child had cystic fibrosis.

The applicants wanted to avoid transmitting the disease to their offspring. However, under Italian law, the use of assisted reproduction technology (hereafter "ART") and preimplantation genetic diagnosis (hereafter "PGD"), which allow genetic tests on an embryo before it is used to start a pregnancy, is possible only for sterile or infertile couples or couples in which the man suffers from a sexually transmissible viral disease (such as the HIV virus, or hepatitis B and C).

Relying on Article 8, the applicants complained that the only possibility open to them was to start a pregnancy by natural means and medically terminate it if the foetus tested positive for the disease. Under Article 14, they claimed that they were the victims of discrimination compared with sterile or infertile couples or couples in which the man suffers from a sexually transmissible viral disease.

The Court considered the applicants' desire to conceive a child without the genetic disease in question to be encompassed by Article 8 as a form of expression of their private and family life. The legislative ban amounted to an interference which is lawful and pursues the legitimate aims of protecting morals and the rights and freedoms of others. However, the Court found the measure in question, which constitutes a blanket ban on PGD, to be disproportionate. It referred to the fact that Italian law allows the applicants to terminate pregnancy on medical grounds if the foetus is found to be affected by the disease.

**\*\*\**Parrillo v. Italy* [GC], no. 46470/11, judgment of 27 August 2015**

PREVENTING A WOMAN FROM DONATING EMBRYOS TO SCIENTIFIC RESEARCH AFTER HER PARTNER'S DEATH: NO VIOLATION OF ARTICLE 8

The applicant, who was born in 1954, had recourse to IVF with her partner in 2002. The resulting five embryos were cryopreserved. Her partner died in 2003. The applicant did not wish to proceed with a pregnancy and requested the release of the embryos so she could donate them to stem-cell research. Citing the prohibition in Law no. 40 adopted in 2004, the clinic refused to release them. The embryos remained in the cryogenic storage bank.

The applicant mainly complained under Article 8 of the Convention and Article 1 of Protocol No. 1 of the statutory prohibition. The latter complaint was declared incompatible *ratione materiae*, given that human embryos cannot be reduced to "*possessions*" within the meaning of that provision.

This was the first time that the Court had had to decide whether the notion of "*private life*" included the right to make use of embryos obtained from IVF treatment by donating them to scientific research, unlike in previous cases in which the embryos were destined to be implanted.

The Court held that Article 8 was applicable in this case under its "*private life*" aspect and relied on the link between the applicant who had undergone IVF and the embryos thus conceived. The applicant's ability to exercise a conscious and considered choice regarding the fate of the embryos in question constituted an intimate aspect of her private life. It was a question of the applicant's right to self-determination. The "*family life*" aspect of Article 8 was not at issue here, since Ms Parrillo did not want to start a family and have the embryos in question implanted.

The Court confirmed the parties' view that the legal prohibition of the donation of embryos to science constituted an interference with the applicant's right to respect for her private life. It accepted that the "*protection of the embryo's potential for life*" invoked by the respondent Government may be linked to the legitimate aims of safeguarding morals and protecting the rights and freedoms of others. It pointed out that it was not thereby taking a position on whether the word "*others*" extends to human embryos.

The Court considered that donating the embryos to scientific research was not one of the core rights under Article 8 but held that Italy was to be given a wide margin of appreciation on these “*delicate moral and ethical questions*”. There was no European consensus on the subject and the Italian Government had not overstepped its wide margin of appreciation.

In reaching this conclusion, the Court gave weight to the depth of the parliamentary discussion and scrutiny of the relevant legislative restriction. It observed that different interests at issue, in particular the State’s interest in protecting the embryo and that of persons wishing to exercise their right to self-determination in the form of donating their embryos to research, were taken into account in that process. Lastly, one of the applicant’s main arguments was that the prohibition was inconsistent since it was, at the same time, lawful for Italian researchers to use cell lines obtained from embryos which had been destroyed abroad. The Court did not consider that this was a circumstance directly affecting the applicant.

**\*\*\*Pending cases:**

***Nedescu v. Romania*, no. 70035/10, communicated on 6 November 2012**

The applicants, a married couple, complain under Article 8 of the Convention about the seizure of frozen embryos which they had deposited with a clinic, followed by the refusal of the National Transplant Agency to authorise their transfer, and finally about the requirements set by the hospital which had been appointed as the new custodian for the embryos in question in order to allow their retrieval and transfer.

***C. Children born through surrogacy arrangements\*\*\****

**\*\*\**D. and Others v. Belgium*, no. 29176/13, decision of 8 July 2014**

REFUSAL BY BELGIAN AUTHORITIES TO ISSUE A TRAVEL DOCUMENT TO A CHILD:  
INADMISSIBLE

A Belgian married couple arranged for a surrogate pregnancy in Ukraine. The child born there on 26 February 2013 as a result of this arrangement received a Ukrainian birth certificate identifying the applicants as its parents. The applicants applied for a Belgian passport for the child but the Belgian authorities refused to issue any travel documents. The child was therefore not allowed to enter Belgium and stayed in Ukraine, separated from the applicants, for about four months. Eventually, the Court of Appeal ordered the Belgian authorities to provide the child with a *laissez-passer* or other appropriate travel document and the child was brought to Belgium on 6 August 2013.

The applicants complained under Article 3 of the Convention about the separation caused by the Belgian authorities’ actions, which had allegedly harmed their child-parent relationship. This was contrary to the best interests of the child and also in breach of their right to respect for their

“*family life*” under Article 8. They also referred to Articles 13 and 6 of the Convention as regards lack of available effective domestic remedies.

The applicants’ complaint concerning the refusal of the Belgian authorities to provide the child with a travel document has been struck out of the list since this issue was resolved as a consequence of the Belgian court’s order.

As to the temporary separation of the child from the applicants, the Court firstly held that it was not disputed that the applicants had genuinely wished to look after the child as his parents ever since his birth and that they had taken action to guarantee an effective family life. This separation amounted to a lawful interference with the applicants’ right to respect for their “*family life*” under Article 8, pursuing the legitimate aim of the prevention of crime, in particular trafficking in human beings. The Court noted the member States’ wide margin of appreciation in this special area. The Convention cannot require States Parties to authorise the entry into their territory of children born to a surrogate mother without prior legal verification on the part of the national authorities and such procedures take some time. Furthermore, since the applicants did not submit all the necessary documents to the court files, they significantly delayed the proceedings to some extent at least. Their complaint under Article 8 was declared inadmissible.

**\*\*\*[Mennesson v. France](#), no. 65192/11, judgment of 26 June 2014, ECHR 2014, and [Labassee v. France](#), no. 65941/11, judgment of 26 June 2014**

REFUSAL BY DOMESTIC AUTHORITIES TO RECOGNISE A PARENT-CHILD RELATIONSHIP IN RESPECT OF CHILDREN BORN AS A RESULT OF A FOREIGN SURROGACY ARRANGEMENT: VIOLATIONS OF ARTICLE 8 AS REGARDS PRIVATE LIFE OF THE CHILDREN

These cases concern married French heterosexual couples who, in order to become parents, arranged for gestational surrogacy in California (in the *Mennessons’* case) and in Minnesota (in the *Labassees’* case) and also their children. In both cases embryos were formed following *in vitro* fertilisation (hereafter IVF) treatment using the gametes of the husbands of the respective couples and eggs from donors. Since this procedure is legal in California and Minnesota, the corresponding United States’ courts ordered prenatally that the applicants should be considered parents once the children were born. The children then received US birth certificates in accordance with the courts’ orders.

In the *Mennesson* case, the children’s birth certificates were entered in the French central register of births, marriages and deaths but the public prosecutor requested the annulment of the registration. The French courts ruled that giving effect to a surrogate agreement by registering the US birth certificates contravened French public policy.

In the *Labassee* case, the child was never registered in France due to the public prosecutor's objections.

The applicants complained in both cases that the children's best interests had been harmed due to the lack of recognition of the legal parent-child relationship.

The Court found that Article 8 was applicable under both the "family" and the "private life" limbs of that provision. The refusal to legally recognise the parent-child relationships at issue interfered with the applicants' right but was lawful and pursued a legitimate aim. On the one hand, member States had a wide margin of appreciation since there is no European consensus on the lawfulness of surrogacy arrangements or on the question of whether a surrogacy arrangement concluded abroad can be legally recognised. On the other hand, the margin was to be reduced since "an essential aspect of the identity of individuals", namely parentage, was concerned (§§ 78-80).

A distinction needed to be drawn between the applicants' right to respect for their family life and the applicants' children's right to respect for their private life.

As to the right to respect for their family life, the Court recognised the daily difficulties that may arise due to the lack of the registration but it also observed that the applicants could nevertheless lead a family life together in France and no violation of Article 8 was found.

With regard to the right to respect for the private life of the children, the violation of Article 8 was found because of the contradiction whereby there is acceptance that the children are linked to the adults pursuant to US law, but French law does not recognise their status in France, thus depriving them of the opportunity of becoming French citizens and full members of French society. Moreover, although their biological fathers were French, they faced worrying uncertainty as to the possibility of obtaining French nationality, a situation that was liable to have negative repercussions on the definition of their own identity and on their inheritance rights. There was therefore a serious issue as to the compatibility of the situation with the children's best interests, which should guide any decision concerning them.

**\*\*\*[Foulon and Bouvet v. France](#), nos. 9063/14 and 10410/14, judgment of 21 July 2016**

REFUSAL BY FRENCH AUTHORITIES TO TRANSCRIBE BIRTH CERTIFICATES ISSUED IN INDIA IN RESPECT OF CHILDREN BORN AS A RESULT OF FOREIGN SURROGACY ARRANGEMENTS: VIOLATIONS OF ARTICLE 8 AS REGARDS PRIVATE LIFE OF THE CHILDREN

In both cases, the applicants are fathers and it is suspected that their children were born as a result of foreign gestational surrogacy ("GPA" – *gestation pour autrui*) agreements in India. The fathers and the children are linked biologically. Their mothers are Indian.

The Nantes Regional Court in both cases granted the transcription of birth certificates issued in India. In the *Foulon* case, further to an appeal by the Public Prosecutor, the Rennes Court of Appeal set aside the decision of the Nantes Regional Court and reiterated the prohibition of surrogacy under French law. The Court of Cassation dismissed the appeal by Mr Foulon and the second applicant's mother.

In the *Bouvet* case, the Rennes Court of Appeal upheld the decision of the Nantes Regional Court on the transcription of the birth certificate, noting that the certificate in question fulfilled the formal requirements and that the public-order interest did not prevail over the best interests of the children concerned. On appeal by the Public Prosecutor, the Court of Cassation set aside this judgment. In both cases, the Court of Cassation cited circumvention of the domestic law ban on GPA agreements.

Relying on its judgments in the previous cases of *Menesson v. France* and *Labassee v. France*, the Court held that there was no violation of Article 8 as regards the fathers' rights to respect for their family life but it found a violation of Article 8 in respect of the right to respect for the private lives of the children concerned.

**\*\*\*Pending cases:**

**\*\*\*[\*Paradiso and Campanelli v. Italy\*](#), no. 25358/12, Chamber judgment of 27 January 2015, case pending before the Grand Chamber**

PLACEMENT OF A CHILD BORN THROUGH SURROGACY ARRANGEMENTS: VIOLATION OF ARTICLE 8

The applicants, an Italian couple, entered into a surrogacy arrangement in Russia. The child born as a result of this surrogacy treatment was allegedly biologically linked to the husband (the applicant). In accordance with Russian law, the applicants were registered as the child's parents, the Russian surrogate mother having given her written consent to the registration.

After the child arrived in Italy with travel documents issued by the Italian Consulate in Moscow and the applicants requested registration of the birth certificate in Italy, criminal proceedings were instituted against the applicants on the grounds of "*altering civil status*". The applicants had allegedly brought the child into Italy in breach of the law prohibiting the use of medically-assisted procreation and they had allegedly violated the conditions set out in their previous adoption authorisation.

At the same time, proceedings concerning the release of the child for adoption were instituted. A DNA test conducted at the court's request showed that there was no genetic link between the applicant and the child. Following a court order concerning the removal of the child from the applicants, social services placed the nine-month-old child in a children's home. The applicants were forbidden from having contact with the child.



The applicants complained of a violation of Article 8 of the Convention, alleging that the refusal to recognise the legal parent-child relationship, the removal of the child, and his placement in care infringed their right to respect for their private and family life.

The Chamber found Article 8 to be applicable. It took into account *de facto* family ties resulting from the fact that the child had lived with the applicants, acting in their role as parents, for at least six months in the first important stages of his young life. The State interference was lawful and pursued the legitimate aim of the “*prevention of disorder*”, since the applicants had acted contrary to the law.

However, the Chamber questioned whether the measures of removing the child from the applicants and placing him in foster care were proportionate. Stressing that the best interests of the child were paramount and noting that the situation was sensitive, the Chamber found that the Italian authorities had failed to strike the right balance between the competing public and private interests.

**\*\*\*[Karine Laborie and Others v. France](#), no. 44024/13, communicated on 16 January 2015**

REFUSAL BY DOMESTIC AUTHORITIES TO REGISTER THE FOREIGN BIRTH CERTIFICATE OF A CHILD BORN THROUGH A SURROGACY ARRANGEMENT ABROAD

This case, similar to the above-mentioned cases of *Mennesson v. France* and *Labassee v. France*, concerns a French married couple who under Ukrainian law became parents of children born as a result of a surrogacy arrangement. The French central register of births, and subsequently the Court of Appeal, rejected the registration of the Ukrainian birth certificate on the grounds of incompatibility with French public policy, in a ruling similar to that in the previous French cases.

The applicants – the couple and their children – complain under Article 8 of a violation of their right to respect for their private and family life.

#### ***D. Assisted suicide***

**[Sanles Sanles v. Spain](#), no. 48335/99, ECHR 2000-XI, decision of 26 October 2000**

INCOMPATIBILITY *RATIONE PERSONAE* OF AN APPLICATION CONCERNING RECOGNITION OF THE RIGHT TO A DIGNIFIED LIFE OR A DIGNIFIED DEATH FILED BY A THIRD PERSON: INADMISSIBLE

The applicant’s brother-in-law was tetraplegic following an accident in 1968 and committed suicide in January 1998 with the help of a third party while his application to have the right to a dignified death recognised was pending. The applicant was the heir legally appointed by him to continue the proceedings which he had instituted while he was alive. She requested in

particular recognition of the right to a dignified life or a dignified death, or to non-interference with her brother-in-law's wish to end his life.

“With regard to the substantive rights relied on by the applicant, the Court has previously held that, under Article 35 § 1 (former 26) of the Convention, the rules of admissibility must be applied with some degree of flexibility and without excessive formalism (see the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 18, § 34). Account also has to be taken of their object and purpose (see, for example, the *Worm v. Austria* judgment of 29 August 1997, Reports 1997-V, § 33) and of those of the Convention in general, which, in so far as it constitutes a treaty for the collective enforcement of human rights and fundamental freedoms, must be interpreted and applied so as to make its safeguards practical and effective (see, for example, the *Yaşa v. Turkey* judgment of 2 September 1998, Reports 1998-VI, § 64).

The Court reiterates that the system of individual petition provided under Article 34 of the Convention excludes applications by way of *actio popularis*. Complaints must therefore be brought by or on behalf of persons who claim to be victims of a violation of one or more of the provisions of the Convention. The concept of victim must, in theory, be interpreted autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act. In order for an applicant to be able to claim to be a victim of a violation of the Convention, they must be able to show that they have been directly affected by the impugned measure (see, for example, the *Open Door and Dublin Well Woman v. Ireland* judgment of 29 October 1992, Series A no. 246, § 44). However, victim status may exist even where there is no damage, such an issue being relevant under Article 41 of the Convention, for the purposes of which pecuniary or non-pecuniary damage flowing from the breach must be established (see, for example, the *Wassink v. the Netherlands* judgment of 27 September 1990, Series A no 185, § 38, and the *Ilhan v. Turkey* [GC] judgment, no. 22277/93, § 52).

...

The Court considers it important to point out from the outset that it is not required to rule on whether or not there is a right under the Convention to a dignified death or a dignified life. It notes that the action (*jurisdicción voluntaria*) brought by Mr Sampedro in the Spanish courts was for recognition of his right to have his general practitioner prescribe him the medication necessary to prevent the suffering, distress and anxiety caused by his condition without that act being considered under the criminal law to be assisting suicide or to be an offence of any kind whatsoever. Admittedly, the applicant may claim to have been very affected by the circumstances surrounding Mr Sampedro's death despite the lack of close family ties. However, the Court considers that the rights claimed by the applicant under Article 2, 3, 5, 8, 9 and 14 of the Convention belong to the category of non-transferable rights. Consequently, the applicant cannot rely on those rights on behalf of Mr Sampedro in the context of his action in the domestic courts.

...

Referring to the decision given by the Constitutional Court in this case, the Court reiterates that the purpose of an amparo appeal is to protect individuals from actual and effective infringements of their fundamental rights. It is not a proper remedy for requesting and obtaining an abstract decision on claims concerning allegedly erroneous interpretations or incorrect applications of constitutional provisions, but only and exclusively claims intended to re-establish or protect fundamental rights where an actual and effective violation has been alleged. It cannot hold the Spanish authorities responsible for failure to comply with an alleged obligation to have a law



passed decriminalising euthanasia. It notes, moreover, that Mr Sampedro ended his days when he wanted to and that the applicant cannot be substituted for Mr Sampedro in respect of his claims for recognition of his right to die in dignity, since such a right, supposing that it can be recognised in domestic law, is in any event of an eminently personal and non-transferable nature.

The Court concludes that the applicant cannot act on Mr Sampedro's behalf and claim to be a victim of Articles 2, 3, 5, 8, 9 and 14 of the Convention, as required by Article 34.

It follows that this part of the application is incompatible *ratione personae* with the provisions of the Convention for the purposes of Article 35 § 1 and must be rejected in accordance with Article 35 § 4.

...

For these reasons, the Court unanimously declares the application inadmissible.”

***Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III, judgment of 29 April 2002***

REFUSAL TO GIVE UNDERTAKING NOT TO PROSECUTE HUSBAND FOR ASSISTING WIFE TO COMMIT SUICIDE; EUTHANASIA: NO VIOLATION OF ARTICLES 2, 3, 8, 9 AND 14

The applicant was dying of motor neurone disease, a degenerative disease affecting the muscles for which there is no cure. Given that the final stages of the disease are distressing and undignified, the applicant wished to be able to control how and when she died. Because of her disease, could not commit suicide alone and wanted her husband to help her. But, although it was not a crime in English law to commit suicide, assisting a suicide was. As the authorities refused her request, the applicant complained under Articles 2, 3, 8, 9 and 14 that her husband had not been guaranteed freedom from prosecution if he helped her to die.

“39. The consistent emphasis in all the cases before the Court has been the obligation of the State to protect life. The Court is not persuaded that “the right to life” guaranteed in Article 2 can be interpreted as involving a negative aspect. While, for example in the context of Article 11 of the Convention, the freedom of association has been found to involve not only a right to join an association but a corresponding right not to be forced to join an association, the Court observes that the notion of a freedom implies some measure of choice as to its exercise (see *Young, James and Webster v. the United Kingdom*, judgment of 13 August 1981, Series A no. 44, pp. 21-22, § 52, and *Sigurdur A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A no. 264, pp. 15-16, § 35). Article 2 of the Convention is phrased in different terms. It is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. To the extent that these aspects are recognised as so fundamental to the human condition that they require protection from State interference, they may be reflected in the rights guaranteed by other Articles of the Convention, or in other international human rights instruments. Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

40. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It is confirmed in this view by the recent Recommendation 1418 (1999) of the Parliamentary Assembly of the Council of Europe (see paragraph 24 above).

...

52. ... The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *D. v. the United Kingdom and Keenan*, both cited above, and *Bensaid v. the United Kingdom*, no. 44599/98, ECHR 2000-I).

...

55. The Court cannot but be sympathetic to the applicant's apprehension that without the possibility of ending her life she faces the prospect of a distressing death. It is true that she is unable to commit suicide herself due to physical incapacity and that the state of law is such that her husband faces the risk of prosecution if he renders her assistance. Nonetheless, the positive obligation on the part of the State which is relied on in the present case would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care. It would require that the State sanction actions intended to terminate life, an obligation that cannot be derived from Article 3 of the Convention.

56. The Court therefore concludes that no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide."

**\*\*[Haas v. Switzerland](#), no. 31322/07, judgment of 20 January 2011**

THE STATE CANNOT BE CRITICISED FOR NOT HAVING ASSISTED A SUICIDE: NO VIOLATION OF ARTICLE 8

The applicant has been suffering from a serious bipolar affective disorder for approximately twenty years and argues that, as a result, he can no longer live in a dignified manner. After having attempted suicide on two occasions, he undertook to obtain a substance, the administration of which in a sufficient quantity would have enabled him to end his life in a safe and dignified manner. Since that substance was only available on prescription, he approached several psychiatrists to obtain it, but was unsuccessful. Before the Court the applicant argued that Article 8 imposed on the State a "*positive obligation*" to create the conditions for suicide to be committed without the risk of failure and without pain. The authorities rejected his application. Relying on Article 8, Mr Haas argued that his right to end his life in a safe and dignified manner had been violated in Switzerland as a result of the conditions that had to be met – and which he did not meet – in order to be able to obtain sodium pentobarbital.

This case raised the issue of whether, by virtue of the right to respect for private life, the State should have ensured that a sick man wishing to commit suicide could obtain a lethal substance without a prescription, by way of derogation from the law, so as to be able to end his life without pain and with no risk of failure.

The Court observed that the Council of Europe member States were far from having reached a consensus as regards the right of an individual to choose how and when to end his life. The Court concluded that the States had a wide margin of discretion in that respect. Considering that the risk of abuse inherent in a system which facilitated assisted suicide could not be underestimated, the Court agreed with the Swiss Government's argument that the restriction on access to sodium pentobarbital was intended to protect health and public safety and to prevent crime. Therefore there had been no violation of Article 8.

**\*\*\**Jack Nicklinson v. the United Kingdom and Paul Lamb v. the United Kingdom*, nos. 2478/15 and 1787/15, decision of 23 June 2015**  
REFUSAL OF DOMESTIC COURT TO ASSESS THE BAN UNDER UK LAW ON ASSISTED SUICIDE AND VOLUNTARY EUTHANASIA: INADMISSIBLE

The cases concerned the ban under UK law on assisted suicide and voluntary euthanasia. Assisted suicide is prohibited by section 2(1) of the Suicide Act 1961 and voluntary euthanasia is considered to be murder under UK law.

The applicant in the first case is the widow of Mr Tony Nicklinson. A stroke in 2005 had left Mr. Nicklinson with “*locked-in syndrome*”, meaning he was mentally sound but paralysed from the neck down and unable to speak. The applicant in the second case, Mr Lamb, was left paralysed after a car accident. He only has slight movement in one hand and requires constant care.

Mr Nicklinson instituted proceedings seeking a declaration that either the provision of medical assistance to end his life would not be unlawful on the grounds that it could be justified under the common law defence of necessity, or that the law on murder and assisted suicide was in breach of his rights under Articles 2 and 8 of the Convention. His claim was dismissed. Concerning voluntary euthanasia, the Divisional Court “*concluded that it would be wrong for the court to hold that Article 8 required voluntary euthanasia to afford a possible defence to murder on the basis that this went far beyond anything which this Court had said, would be inconsistent with previous domestic and Strasbourg judgments and would be to usurp the proper role of Parliament*” (see § 13). As to assisted suicide, in particular concerning the ban set out by Article 2 (1) of the Suicide Act 1961, the Divisional Court found that this was a matter for determination by Parliament. Mr Nicklinson later died of pneumonia. His

widow continued the proceedings in her own name and on behalf of her husband.

The Court of Appeal dismissed the appeal in July 2013. Before the Supreme Court, the applicants focused exclusively on the compatibility of the ban on assisted suicide with Article 8 of the Convention. In June 2014 the Supreme Court dismissed the appeal. It found that such a sensitive issue was for Parliament to resolve.

Mrs Nicklinson complained that the domestic courts had failed to determine the compatibility of the law in the UK on assisted suicide with her and her husband's right to respect for their private and family life under Article 8. The Court declared that part of the application inadmissible as being manifestly ill-founded, finding that Article 8 did not impose procedural obligations requiring the domestic courts to examine the merits of a challenge brought in respect of primary legislation in the present case. In any event, it was of the view that the majority of the Supreme Court had examined the substance of Mrs Nicklinson's complaint.

As to the second applicant, Mr Lamb complained under Articles 6, 8, 13 and 14 of the absence of a judicial procedure to authorise voluntary euthanasia. Given that before the Supreme Court the applicant pursued only the complaint concerning the ban on assisted suicide and not the argument concerning voluntary euthanasia, the Court rejected his complaint for non-exhaustion.

***Koch v Germany, no. 497/09, judgment of 19 July 2012***

REFUSAL BY THE GERMAN COURTS TO EXAMINE THE MERITS OF A COMPLAINT FOLLOWING THE GERMAN MEDICAL AUTHORITIES' REFUSAL TO ISSUE AN AUTHORISATION TO A PARALYSED PATIENT TO OBTAIN LETHAL MEDICATION: VIOLATION OF ARTICLE 8

The applicant's wife suffered from almost complete quadriplegia after falling down steps in 2002 and thereafter needed artificial ventilation and constant care from nursing staff. Wishing to end her life by committing suicide, the applicant's wife applied to the Federal Institute for Drugs and Medical Devices for authorisation to obtain a lethal dose of pentobarbital of sodium to enable her to commit suicide at home. After the authorisation was refused, on 12 February 2005 she committed suicide in Switzerland, assisted by the organisation *Dignitas*. On 3 March 2005, the Institute reaffirmed its decision and Mr Koch lodged an action for a declaration that the Institute's decisions had been unlawful and that it had had a duty to grant his wife the requested authorisation. His claim was unsuccessful before the administrative courts and also before the Federal Constitutional Court. The German courts declared the applicant's action inadmissible because he could not claim to be a victim himself.

The applicant complained that the refusal to grant his wife authorisation to obtain a lethal dose of medication infringed her rights under Article 8 of the Convention, in particular her right to a dignified death, and that it

infringed his own right to respect for his private and family life as he had been forced to travel to Switzerland to enable his wife to commit suicide. He further complained under Article 13 that the German courts had violated his rights under Article 13.

The Court firstly noted that the applicant submitted that his wife's suffering and the eventual circumstances of her death had affected him in his capacity as a compassionate husband and carer in a way which led to a violation of his own rights under Article 8. Nevertheless, the Court considered that the criteria developed in its previous case-law for allowing a relative or heir to bring an action before the Court on the deceased person's behalf were also of relevance for assessing the question whether a relative can claim a violation of his own rights under Article 8. These criteria were the following:

- (i) the existence of close family ties;
- (ii) sufficient personal or legal interest on the applicant's part in the outcome of the proceedings; and
- (iii) the applicant's previously-expressed interest in the case (§ 44).

Referring to the exceptionally close relationship between the applicant and his wife, the Court found that the applicant had been directly affected by the Federal Institute's refusal to grant authorisation to his wife to acquire lethal medication. This rejection, together with the German Court's refusal to examine the merits of the complaint, interfered with the applicant's right to respect for his private life under Article 8. The Court found that the domestic authorities were under an obligation to examine the merits of the applicant's claim even in a case in which the substantive right in question had yet to be established. It decided to limit itself to examining the procedural aspect of Article 8. A violation was found.

As to the alleged violation of the applicant's wife's rights, the Court confirmed the principle that Article 8 was of a non-transferable nature and the applicant could therefore not rely on his wife's Convention rights. His complaint was rejected as incompatible *ratione personae*.

**\*\*\*[Gross v. Switzerland \[GC\]](#), no. 67810/10, judgment of 30 September 2014**

REFUSAL BY THE SWISS HEALTH BOARD TO PRESCRIBE LETHAL DRUGS TO AN ELDERLY APPLICANT NOT SUFFERING FROM A TERMINAL ILLNESS: INADMISSIBLE AFTER THE DEATH OF THE APPLICANT IN THE COURSE OF THE PROCEEDINGS

The applicant was born in 1931. She found herself becoming frail with advancing age and she wished to end her life. She was not suffering from any critical illness. Her request to the Health Board of the Canton of Zurich to be provided with a lethal dose of sodium pentobarbital was rejected. This decision was upheld by the Swiss courts.

In its Chamber judgment of 14 May 2013 the Court found a violation of Article 8 due to the absence of clear and comprehensive legal guidelines as to whether and in what circumstances a doctor is entitled to issue a prescription for lethal drugs to a patient who, like the applicant, is not suffering from a terminal illness. At the same time, the Court emphasised that it was not taking a stance on the substantive content of such guidelines.

Subsequently, the case was referred to the Grand Chamber at the request of the Swiss Government. In those proceedings, the Government informed the Court that it had learned that the applicant had died in November 2011, in the way she wished. The applicant's counsel explained that he had complied with the instructions given by the applicant, who did not want any direct personal communication with him and wished instead to be approached through an intermediary. He was only informed of the death of his client by the Government's memorandum in January 2014. The applicant expressed to the intermediary her wish that the proceedings continue after her death.

In its Grand Chamber judgment of 30 September 2014 the Court, by a majority, declared the application inadmissible, holding that the applicant's conduct constituted an abuse of the right of application. It admonished the applicant's counsel, who should not have agreed to communicate with her indirectly through an intermediary. The applicant had intended to mislead the Court on a matter concerning the very core of her complaint. In particular, she had taken special precautions to prevent information about her death from being disclosed to her counsel, and thus to the Court, in order to prevent the latter from discontinuing the proceedings in her case.

### ***E. Consent to medical examination or treatment***

#### **(1) General issues of consent**

***Hoffmann v. Austria, no. 12875/87, judgment of 23 June 1993, Series A no. 255-C***

AWARD OF CUSTODY OF CHILDREN ON BASIS OF RELIGION (JEHOVAH'S WITNESSES); REFUSAL OF BLOOD TRANSFUSIONS: VIOLATION OF ARTICLE 8 IN CONJUNCTION WITH ARTICLE 14

"28. The applicant complained that the Austrian Supreme Court had awarded parental rights over the children Martin and Sandra to their father in preference to herself because she was a member of the religious community of Jehovah's Witnesses; she claimed a violation of her rights under Article 8 (art. 8) of the Convention, both taken alone and read in conjunction with Article 14 (art. 14+8).

...

31. In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, amongst other

authorities, the *Sunday Times v. the United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, p. 32, § 58).

It must first be determined whether the applicant can claim to have undergone different treatment.

32. In awarding parental rights – claimed by both parties – to the mother in preference to the father, the Innsbruck District Court and Regional Court had to deal with the question whether the applicant was fit to bear responsibility for the children’s care and upbringing. In so doing they took account of the practical consequences of the religious convictions of the Jehovah’s Witnesses, including their rejection of holidays such as Christmas and Easter which are customarily celebrated by the majority of the Austrian population, their opposition to the administration of blood transfusions, and in general their position as a social minority living by its own distinctive rules.

...

33. This Court does not deny that, depending on the circumstances of the case, the factors relied on by the Austrian Supreme Court in support of its decision may in themselves be capable of tipping the scales in favour of one parent rather than the other. However, the Supreme Court also introduced a new element, namely the Federal Act on the Religious Education of Children (see paragraphs 15 and 23 above). This factor was clearly decisive for the Supreme Court.

The European Court therefore accepts that there has been a difference in treatment and that that difference was on the ground of religion; this conclusion is supported by the tone and phrasing of the Supreme Court’s considerations regarding the practical consequences of the applicant’s religion.

Such a difference in treatment is discriminatory in the absence of an “objective and reasonable justification”, that is, if it is not justified by a “legitimate aim” and if there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see, amongst other authorities, the *Darby v. Sweden* judgment of 23 October 1990, Series A no. 187, p. 12, § 31).

34. The aim pursued by the judgment of the Supreme Court was a legitimate one, namely the protection of the health and rights of the children; it must now be examined whether the second requirement was also satisfied.

...

36. ... Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.

The Court therefore cannot find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.”

***Glass v. the United Kingdom*, no. 61827/00, ECHR 2004-II, judgment of 9 March 2004**

UNAUTHORISED MEDICAL TREATMENT OF THE APPLICANTS’ SEVERELY MENTALLY AND PSYCHOLOGICALLY DISABLED SON WITHOUT COURT AUTHORISATION: VIOLATION OF ARTICLE 8

“61. The applicants maintained that the decisions to administer diamorphine to the first applicant against the second applicant's wishes and to place a DNR [do not



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resuscitate] notice in his notes without the second applicant's knowledge interfered with the first applicant's right to physical and moral integrity as well as with the second applicant's Article 8 rights. In their submission, the failure of the hospital authority to involve the domestic courts in the decision to intervene without the second applicant's consent resulted in a situation in which there was an interference with the first applicant's right which was not in accordance with the law.

...

70. The Court notes that the second applicant, as the mother of the first applicant – a severely handicapped child – acted as the latter's legal proxy. In that capacity, the second applicant had the authority to act on his behalf and to defend his interests, including in the area of medical treatment. The Government have observed that the second applicant had given doctors at St Mary's Hospital on the previous occasions on which he had been admitted authorisation to pursue particular courses of treatment (see paragraphs 15, 17 and 66 above). However, it is clear that, when confronted with the reality of the administration of diamorphine to the first applicant, the second applicant expressed her firm opposition to this form of treatment. These objections were overridden, including in the face of her continuing opposition. The Court considers that the decision to impose treatment on the first applicant in defiance of the second applicant's objections gave rise to an interference with the first applicant's right to respect for his private life, and in particular his right to physical integrity ... It is to be noted that the Government have also laid emphasis on their view that the doctors were confronted with an emergency (which is disputed by the applicants) and had to act quickly in the best interests of the first applicant. However, that argument does not detract from the fact of interference. It is, rather, an argument which goes to the necessity of the interference and has to be addressed in that context.

...

77. As to the legitimacy of the aim pursued, the Court considers that the action taken by the hospital staff was intended, as a matter of clinical judgment, to serve the interests of the first applicant. It observes in this connection that it rejected in its partial decision on admissibility of 18 March 2003 any suggestion under Article 2 of the Convention that it was the doctors' intention unilaterally to hasten the first applicant's death, whether by administering diamorphine to him or by placing a DNR notice in his case notes.

78. Turning to the "necessity" of the interference in issue, the Court considers that the situation which arose at St Mary's Hospital between 19 and 21 October 1998 cannot be isolated from the earlier discussions in late July and early September 1998 between members of the hospital staff and the second applicant about the first applicant's condition and how it should be treated in the event of an emergency. The doctors at the hospital were obviously concerned about the second applicant's reluctance to follow their advice, in particular their view that morphine might have to be administered to her son in order to relieve any distress which the first applicant might experience during a subsequent attack. It cannot be overlooked in this connection that Dr Walker recorded in his notes on 8 September 1998 that recourse to the courts might be needed in order to break the deadlock with the second applicant. Dr Hallet reached a similar conclusion following his meeting with the second applicant on 9 September (see paragraphs 12 and 17 above).

79. It has not been explained to the Court's satisfaction why the Trust did not at that stage seek the intervention of the High Court. The doctors during this phase all shared a gloomy prognosis of the first applicant's capacity to withstand further crises. They were left in no doubt that their proposed treatment would not meet with the agreement of the second applicant. Admittedly, the second applicant could have brought the matter before



the High Court. However, in the circumstances it considers that the onus was on the Trust to take the initiative and to defuse the situation in anticipation of a further emergency.

80. The Court can accept that the doctors could not have predicted the level of confrontation and hostility which in fact arose following the first applicant's readmission to the hospital on 18 October 1998. However, in so far as the Government have maintained that the serious nature of the first applicant's condition involved the doctors in a race against time with the result that an application by the Trust to the High Court was an unrealistic option, it is nevertheless the case that the Trust's failure to make a High Court application at an earlier stage contributed to this situation.

81. That being said, the Court is not persuaded that an emergency High Court application could not have been made by the Trust when it became clear that the second applicant was firmly opposed to the administration of diamorphine to the first applicant. However, the doctors and officials used the limited time available to them in order to try to impose their views on the second applicant. It observes in this connection that the Trust was able to secure the presence of a police officer to oversee the negotiations with the second applicant but, surprisingly, did not give consideration to making a High Court application even though "the best interests procedure can be involved at short notice" (see the decision of Mr Justice Scott Baker in the High Court proceedings at paragraph 38 above).

82. The Court would further observe that the facts do not bear out the Government's contention that the second applicant had consented to the administration of diamorphine to the first applicant in the light of the previous discussions which she had had with the doctors. Quite apart from the fact that those talks had focused on the administration of morphine to the first applicant, it cannot be stated with certainty that any consent given was free, express and informed. In any event, the second applicant clearly withdrew her consent, and the doctors and the Trust should have respected her change of mind and should not have engaged in rather insensitive attempts to overcome her opposition.

83. The Court considers that, having regard to the circumstances of the case, the decision of the authorities to override the second applicant's objection to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8 of the Convention. In view of that conclusion, it does not consider it necessary to examine separately the applicants' complaint regarding the inclusion of the DNR notice in the first applicant's case notes without the consent and knowledge of the second applicant. It would however observe, in line with its admissibility decision, that the notice was only directed against the application of vigorous cardiac massage and intensive respiratory support, and did not exclude the use of other techniques, such as the provision of oxygen, to keep the first applicant alive."

**Jalloh v. Germany [GC], no. 54810/00, judgment of 11 July 2006**

FORCIBLE ADMINISTRATION OF EMETICS IN ORDER TO OBTAIN EVIDENCE OF A DRUGS OFFENCE, USE OF THIS ILLEGALLY OBTAINED EVIDENCE AT THE TRIAL: VIOLATION OF ARTICLE 6

**Alleged violation of Article 3 of the Convention**

"68. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading"

when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, Commission's report of 8 July 1993, Series A no. 280, p. 14, § 67), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the Greek case"), nos. 3321/67 *et al.*, Commission's report of 5 November 1969, Yearbook 12, p. 186; *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2821-22, § 55; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; *Price*, cited above, § 24). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120).

69. With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit of no derogation (*Mouisel*, cited above, § 40; *Gennadi Naoumenko*, cited above, § 112). A measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading (see, in particular, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, pp. 25-26, § 82; *Gennadi Naoumenko*, cited above, § 112). This can be said, for instance, about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the decision, for example to force-feed, exist and are complied with (*Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, 5 April 2005).

70. Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention do not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him evidence of his involvement in the commission of a criminal offence. Thus, the Convention institutions have found on several occasions that the taking of blood or saliva samples against a suspect's will in order to investigate an offence did not breach these Articles in the circumstances of the cases examined by them (see, *inter alia*, *X. v. the Netherlands*, no. 8239/78, Commission decision of 4 December 1978, *Decisions and Reports* (DR) 16, pp. 187-189; *Schmidt v. Germany* (dec.), no. 32352/02, 5 January 2006).

71. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case. This is especially true where the procedure is intended to retrieve from inside the individual's body real evidence of the very crime of which he is suspected. The particularly intrusive nature of such an act requires a strict scrutiny of all the surrounding circumstances. In this connection, due regard must be had to the seriousness of the offence at issue. The authorities must also demonstrate that they took into consideration alternative methods of recovering the evidence. Furthermore,

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the procedure must not entail any risk of lasting detriment to a suspect's health (see, *mutatis mutandis*, *Nevmerzhitsky*, cited above, §§ 94, 97; *Schmidt*, cited above).

72. Moreover, as with interventions carried out for therapeutic purposes, the manner in which a person is subjected to a forcible medical procedure in order to retrieve evidence from his body must not exceed the minimum level of severity prescribed by the Court's case-law on Article 3 of the Convention. In particular, account has to be taken of whether the person concerned experienced serious physical pain or suffering as a result of the forcible medical intervention (see *Peters v. the Netherlands*, no. 21132/93, Commission decision of 6 April 1994; *Schmidt*, cited above; *Nevmerzhitsky*, cited above, §§ 94, 97).

73. Another material consideration in such cases is whether the forcible medical procedure was ordered and administered by medical doctors and whether the person concerned was placed under constant medical supervision (see, for instance, *Ilijkov v. Bulgaria*, no. 33977/96, Commission decision of 20 October 1997).

74. A further relevant factor is whether the forcible medical intervention resulted in any aggravation of his or her state of health and had lasting consequences for his or her health (see *Ilijkov*, cited above, and, *mutatis mutandis*, *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004).

...

79. As to the manner in which the emetics were administered, the Court notes that, after refusing to take the emetics voluntarily, the applicant was pinned down by four police officers, which shows that force verging on brutality was used against him. A tube was then fed through his nose into his stomach to overcome his physical and mental resistance. This must have caused him pain and anxiety. He was subjected to a further bodily intrusion against his will through the injection of another emetic. Account must also be taken of the applicant's mental suffering while he waited for the emetics to take effect. During this time he was restrained and kept under observation by police officers and a doctor. Being forced to regurgitate under these conditions must have been humiliating for him. The Court does not share the Government's view that waiting for the drugs to pass out of the body naturally would have been just as humiliating. Although it would have entailed some invasion of privacy because of the need for supervision, such a measure nevertheless involves a natural bodily function and so causes considerably less interference with a person's physical and mental integrity than forcible medical intervention (see, *mutatis mutandis*, *Peters*, cited above; *Schmidt*, cited above).

...

82. Having regard to all the circumstances of the case, the Court finds that the impugned measure attained the minimum level of severity required to bring it within the scope of Article 3. The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant's health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3.

83. Accordingly, the Court concludes that there has been a violation of Article 3 of the Convention.”

...

**Alleged violation of Article 6 of the Convention**

“87. The applicant further considered that his right to a fair trial guaranteed by Article 6 of the Convention had been infringed by the use at his trial of the evidence obtained by the administration of the emetics. He claimed in particular that his right not to incriminate himself had been violated.

...

105. As noted above, the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings. The Court has not found in the instant case that the applicant was subjected to torture. In its view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim’s guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the US Supreme Court’s judgment in the *Rochin* case to “afford brutality the cloak of law”. It notes in this connection that Article 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that statements which are established to have been made as a result of torture shall not be used in evidence in proceedings against the victim of torture.

...

108. In these circumstances, the Court finds that the use in evidence of the drugs obtained by the forcible administration of emetics to the applicant rendered his trial as a whole unfair.

109. This finding is of itself a sufficient basis on which to conclude that the applicant was denied a fair trial in breach of Article 6. However, it considers it appropriate to address also the applicant’s argument that the manner in which the evidence was obtained and the use made of it undermined his right not to incriminate himself.”

***Bogumil v. Portugal*, no. 35228/03, judgment of 7 October 2008**

ALLEGED LACK OF CONSENT TO AN OPERATION FOLLOWING THE INGESTION OF COCAINE

BAGS: INADMISSIBLE

« 69. S’agissant en particulier des interventions médicales auxquelles une personne détenue est soumise contre sa volonté, l’article 3 de la Convention impose à l’Etat une obligation de protéger l’intégrité physique des personnes privées de liberté, notamment par l’administration des soins médicaux requis. Les personnes concernées n’en demeurent pas moins protégées par l’article 3, dont les exigences ne souffrent aucune dérogation (*Mouisel*, arrêt précité, § 40, et *Gennadi Naoumenko*, arrêt précité, § 112). Une mesure dictée par une nécessité thérapeutique du point de vue des conceptions médicales établies ne saurait en principe passer pour inhumaine ou dégradante (voir, en particulier, *Herczegfalvy c. Autriche*, arrêt du 24 septembre 1992, série A n° 244, pp. 25-26, § 82, et *Gennadi Naoumenko*, arrêt précité, § 112). Il incombe pourtant à la Cour de s’assurer que la nécessité médicale a été démontrée de

manière convaincante et que les garanties procédurales dont doit s'entourer la décision de procéder à une telle mesure existent et ont été respectées (*Jalloh c. Allemagne* [GC], n° 54810/00, § 69, CEDH 2006-IX).

70 Il faut en outre tenir compte des points de savoir si l'intervention médicale pratiquée sous la contrainte a causé à la personne concernée de vives douleurs ou souffrances physiques, si elle a été ordonnée et exécutée par des médecins, si la personne concernée a fait l'objet d'une surveillance médicale constante et, enfin, si ladite intervention a entraîné une aggravation de l'état de santé de l'intéressé ou a eu des conséquences durables pour sa santé (*Jalloh*, précité, §§ 72-74).

*i. Sur le consentement*

71. En l'espèce, la première question sur laquelle la Cour est tenue de se prononcer est de savoir si le requérant a consenti ou non à l'intervention médicale en cause. Si en effet il y a eu consentement éclairé, comme l'allègue le Gouvernement, aucune question ne se pose sous l'angle de l'article 3 de la Convention.

(...)

76. Dans ces conditions, la Cour, faute d'éléments suffisants à cet effet, n'estime pas établi que le requérant ait donné son consentement à l'intervention en cause. Rien n'indique par ailleurs qu'il aurait refusé l'intervention chirurgicale et qu'il ait été forcé à la subir.

*ii. Sur l'intervention médicale*

77. S'agissant d'abord de la finalité de l'intervention médicale litigieuse, la Cour estime au vu des éléments de fait disponibles qu'elle a découlé d'une nécessité thérapeutique et non de la volonté de recueillir des éléments de preuve. En effet, nul ne conteste que le requérant risquait de mourir d'une intoxication. Par ailleurs celui-ci a été maintenu sous observation pendant quarante-huit heures : c'est seulement lorsqu'il est apparu que le fait d'attendre l'expulsion du sachet par les voies naturelles constituait un risque pour sa vie que le personnel médical – et non la police – a décidé de pratiquer l'intervention chirurgicale. Enfin, comme le souligne le Gouvernement, le sachet de drogue ingéré par le requérant n'était pas indispensable – et encore moins déterminant – aux fins des poursuites pénales : le requérant a été condamné sur la base de plusieurs autres éléments de preuve, notamment la drogue saisie lors de son interpellation à l'aéroport de Lisbonne (paragraphe 28 ci-dessus).

78. A propos des risques pour la santé que comportait l'opération en cause, le Gouvernement a souligné – et le requérant n'a pas contesté – qu'il s'agissait d'une intervention simple. La Cour constate par ailleurs qu'elle a eu lieu dans un hôpital civil et qu'elle a été pratiquée par un personnel médical compétent. Enfin, à aucun moment il n'a été nécessaire d'utiliser la force envers le requérant.

79. Pour ce qui est de la surveillance médicale, la Cour observe que si le requérant a été transféré le jour même de l'intervention de l'hôpital civil à l'hôpital pénitentiaire, ce qui peut susciter une certaine perplexité, il n'en demeure pas moins qu'il a bénéficié à l'hôpital pénitentiaire d'une surveillance constante et d'un suivi médical adéquat, ce jusqu'au 6 décembre 2002, date de son transfert vers un établissement pénitentiaire.

80. Quant aux effets de l'intervention sur la santé du requérant, la Cour prend note des affirmations de celui-ci sur ce point. Eu égard toutefois aux éléments du dossier, elle ne juge pas établi que les troubles dont l'intéressé dit souffrir depuis lors soient liés à l'opération en cause.

81. Compte tenu de l'ensemble des circonstances de l'espèce, qui présentent des différences considérables par rapport à celles de l'affaire *Jalloh* précitée – qui portait également sur l'extraction d'un sachet de stupéfiants hors de l'estomac de l'intéressé –, la Cour estime que l'intervention litigieuse n'a pas été de nature à constituer un traitement inhumain ou dégradant contraire à l'article 3 de la Convention.

82. Dès lors, il n'y a pas eu violation de cette disposition. »

**\*\*M.A.K. and R.K. v. the United Kingdom, nos. 45901/05 and 40146/06, judgment of 23 March 2010**

MEDICAL EXAMINATION OF A NINE-YEAR OLD GIRL WITHOUT HER PARENTS' CONSENT:  
VIOLATION OF ARTICLES 8 AND 13

The applicants in the case were M.A.K. and his daughter R.K. The case concerns R.K.'s hospitalisation, which followed an examination by a paediatrician who believed that the bruising on her legs had been caused by physical abuse. On further examination, the paediatrician concluded that R.K. had also been sexually abused and M.A.K. was identified as a potential perpetrator. R.K. was later discharged after being diagnosed with a rare skin disease. Relying on Article 3 of the Convention, M.A.K. alleged that he was caused distress and humiliation on account of the accusations against him. The applicants also complained under Article 8 of the Convention about the visiting restrictions during the ten days that R.K. was in hospital and that a blood sample and photographs were taken without parental consent. Further relying on Article 6 § 1 (right of access to a court) of the Convention, R.K. complained that legal aid was withdrawn from her during the appeal proceedings against the local authority and hospital for compensation. M.A.K. also complained that, in breach of Article 13 of the Convention, he could not claim compensation for damage caused by the local authority's handling of his daughter's case on account of the domestic courts' finding that there was no common law duty of care owed to parents.

The Court noted that the authorities, both medical and social, had duties to protect children and could not be held liable every time genuine and reasonably held concerns about the safety of children *vis-à-vis* members of their family were proved, retrospectively, to have been misguided. Having taken into account that domestic law and practice clearly required the consent of parents or those exercising parental responsibility before any medical intervention could take place, the Court found no justification for the decision to conduct a blood test and take intimate photographs of a nine-year old girl, against the express wishes of both her parents, while she was alone in the hospital and confirmed the violation of Article 8 of the Convention. In view of the fact that M.A.K. should have had available to him a means of claiming that the local authority was responsible for any damage which he had suffered and of obtaining compensation for that damage, the Court held that there had been a violation of Article 13. All the other complaints were rejected by the Court.

**\*\*\**Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, ECHR 2012, judgment of 13 November 2012**

REFUSAL OF ACCESS TO AN UNAUTHORISED EXPERIMENTAL DRUG FOR TERMINALLY-ILL CANCER PATIENTS: NO VIOLATION OF ARTICLES 2, 3 AND 8

The applicants are ten Bulgarian nationals, nine of whom are or were terminally-ill cancer patients. Four of them have died since lodging their application and the proceedings have been pursued by their relatives in their stead. The nine applicants had undergone various conventional treatments before being advised by a private clinic, the Medical Centre for Integrative Medicine OOD, about an experimental anti-cancer product (MBVax Coley Fluid). Although the drug had not been officially authorised in any country, it could be administered to patients for “*compassionate use*” in a number of countries.

The applicants brought an action against the authority in charge of supervising the quality, safety and efficacy of medicinal products, pointing out that MBVax Coley Fluid was an experimental product not yet authorised or undergoing clinical trials in any country. This meant that it could not be authorised for use in Bulgaria under the relevant legislation, since the law made no provision for the use of unauthorised medicines outside clinical trials. Moreover, unlike the situation obtaining in other European countries, compassionate use of unauthorised products was not possible in Bulgaria. Finally, under European Union law there was no obligation to adopt a harmonised approach in this area. Some of the applicants appealed against this decision before the Ministry of Health but none of them sought judicial review.

The applicants complained that the refusal of the Bulgarian authorities to grant them access to experimental product was in breach of Articles 2, 3 and 8 of the Convention.

The Court firstly decided that the heirs of four deceased applicants had standing in the proceedings. The Court noted under Article 2 that a State’s positive obligation might include the duty to put in place an appropriate legal framework, for instance regulations compelling hospitals to adopt appropriate measures for the protection of their patients’ lives. However, Bulgaria did have in place regulations governing access to unauthorised medicine in cases where conventional forms of medical treatment appeared insufficient. Article 2 could not be interpreted as requiring that access to unauthorised medicine for the terminally ill be regulated in a particular way.

Under Article 3, the Court considered that the applicants’ complaint was based on an extended concept of inhuman and degrading treatment which it could not accept. It could not be said that by refusing the applicants access to a product – even if potentially life-saving – whose safety and efficacy were still in doubt, the authorities had directly added to the applicants’ physical suffering. It was true that the Bulgarian authorities’ decision, in as much as it had prevented the applicants from having recourse to a product

which they believed might have improved their chances of healing and survival, had caused them mental suffering, especially in view of the fact that the product was available on an exceptional basis in other countries. However, it could not be categorised as inhuman treatment. Article 3 did not oblige States to alleviate the disparities between the levels of health care available in various countries. Lastly, the Court did not consider that the refusal could be regarded as humiliating or debasing the applicants.

In finding that there was likewise no violation of Article 8, the Court pointed out that member States had a wide margin of appreciation in respect of matters of health-care policy. It could not determine whether the authorities' refusal should be classified as an interference with the applicants' rights or as a failure to provide an appropriate legal framework enabling respect for the private life of persons in the applicants' situation (positive obligation). However, the crucial question in the case was how to strike a fair balance between the competing individual and public interests. Taking into account the applicants' interests in being treated with experimental products, the Court balanced them against the countervailing public interest in being protected from the risks of experimental medicine. It held that the existing legislation struck an appropriate balance, since it allowed the use of products if they had already been authorised in another country.

**\*\*\*[\*Arskaya v. Ukraine\*](#), no. 45076/05, judgment of 5 December 2013**

ACCEPTING THE REFUSAL OF MEDICAL TREATMENT BY A PERSON SUFFERING FROM A PARANOID DISORDER WITHOUT EXAMINING HIS OR HER DECISION-MAKING CAPACITY: VIOLATION OF ARTICLE 2

The applicant's forty-two-year-old son, S., was hospitalised for pneumonia and tuberculosis on 22 March 2001. Even though his medical condition was worsening, he refused a bronchoscopy on three occasions. He was also examined by a psychiatrist and diagnosed with a paranoid disorder. S. remained in an extremely serious condition and continued to refuse intramuscular injections. He died on 3 April 2001. The internal inquiry into the doctors' alleged malpractice revealed certain deficiencies concerning the doctors' behaviour and the existing regulations.

The criminal proceedings into the applicant's complaint of medical malpractice were terminated in August 2008, after 7 years and 4 months, for lack of evidence. The national authorities found that the applicant's son had repeatedly refused to accept medical treatment, which had aggravated his condition and ultimately resulted in his death.

The applicant complained under Article 2 that the hospital medical staff had failed to provide her son with appropriate and urgent medical treatment, which had resulted in his death. She further complained under Articles 6 and 7 of the Convention that the domestic authorities had not carried out an effective investigation into her son's death.



As to the question under Article 2 whether the legal system as a whole had adequately dealt with the case, the Court firstly scrutinised the internal inquiry and disciplinary proceedings. It found that one of the central issues in determining the validity of a refusal to undergo medical treatment by a patient was the issue of his or her decision-making capacity. The doctors did not examine the issue of S.'s capacity to understand, even though the file clearly showed that his mental soundness had been called into question. Therefore, it could not be concluded that the board of inquiry and the chief physician of the hospital had made an adequate attempt to examine all the relevant facts concerning the death of the applicant's son and to identify the persons responsible.

Taking into account the shortcomings of the criminal investigation and its excessive length, the Court also held that the criminal proceedings had been ineffective in the present case. Mindful of that fact, the Court found that it would be excessive to force the applicant to lodge a separate civil claim. The Court concluded that the applicant had not been provided with effective legal procedures compatible with the procedural requirements of Article 2 of the Convention.

\*\*\*[\*Petrova v. Latvia\*](#), no. 4605/05, judgment of 24 June 2014

ORGAN TRANSPLANTATION WITHOUT CONSENT: VIOLATION OF ARTICLE 8

On 26 May 2002 the applicant's son sustained very serious injuries in a road traffic accident. He was taken to a public hospital in Riga. Following surgery, his condition deteriorated and he died on 29 May 2002. Nine months later the applicant discovered – when reading the post-mortem report issued during the criminal proceedings against the person held liable for the car accident – that her son's kidneys and spleen had been removed for organ transplantation purposes immediately after his death.

Latvian law at the material time explicitly provided for the right on the part of not only the person concerned but also his or her closest relatives, including parents, to express their wishes in relation to removal of organs after that person's death.

The applicant complained under Article 8 about the removal of her son's organs without his prior consent or her consent.

The Court noted that the principal disagreement between the parties was whether or not the law – which in principle afforded the closest relatives the right to express wishes in relation to imminent organ removal – was sufficiently clear as regards the implementation of this right.

The Court found that the relevant law as applied at the material time did not define with sufficient clarity the scope of the corresponding obligation or the discretion conferred on medical practitioners or other authorities in this respect. It remained unclear how the "*presumed consent system*", as established under Latvian law, operated in practice in the circumstances in which the applicant found herself, whereby she had certain rights as the

closest relative but was not informed – let alone provided with any explanation – as to how and when these rights might be exercised. Neither did Latvian law afford adequate legal protection against arbitrariness. There had been a violation of Article 8.

**\*\*\*[M.S. v. Croatia \(no. 2\)](#), no. 75450/12, judgment of 19 February 2015**  
 CONFINEMENT IN PSYCHIATRIC HOSPITAL WITHOUT CONSENT AND LEGAL REPRESENTATION: VIOLATION OF ARTICLES 3 AND 5

The key issue of this case is the applicant's involuntary confinement in a psychiatric hospital for one month. On 29 October 2012 the applicant went to see her family doctor complaining of severe lower-back pain. She was sent to the emergency health service, where she was examined by a psychiatrist and was diagnosed with acute psychotic disorder, and prescribed hospitalisation. She was immediately, and against her will, admitted to a psychiatric clinic, where she was tied to a bed in an isolation room for one night. After a county court judge had authorised her involuntary retention, which was subsequently extended by the court, the applicant remained in the clinic – her appeal against that decision being dismissed – until being discharged on 29 November 2012. She was assigned a legal-aid lawyer, who did not, in the event, actually provide legal assistance in the proceedings and never contacted her.

Relying on Article 3, the applicant complained that she had been ill-treated during her confinement in the psychiatric hospital, and that there had been no effective investigation in that respect. Further relying, in substance, on Article 5 § 1 (e), she complained of having been unlawfully and unjustifiably detained in hospital, and that the relevant court decision had not been accompanied by adequate procedural safeguards.

The Court found that there had been violations under the procedural and substantive limbs of Article 3. It noted the vulnerability of mentally-ill persons. The deprivation of liberty and use of coercive measures against such persons with psychological or intellectual disabilities had to be justified by medical necessity and proportionality. The use of such measures was seen as a last resort, to be applied only in order to prevent harm to the patient or others. Further, the Court found a violation of Article 5 § 1 (e) on the grounds that the domestic authorities had failed to take appropriate measures to secure the applicant's effective legal representation and to ensure that all necessary procedural requirements were met.

**\*\*\*[Lambert and others v. France \[GC\]](#), no. 46043/14, judgment of 5 June 2015**  
 DECISION BY A DOCTOR TO WITHDRAW LIFE-SUSTAINING TREATMENT FROM A PATIENT WHO HAD NOT LEFT CLEAR INSTRUCTIONS IN ADVANCE: NO VIOLATION OF ARTICLES 2 AND 8

Vincent Lambert was a victim of a road-traffic accident in 2008, which had left him in a chronic vegetative state and dependent on artificial enteral

nutrition. He had made no living will and given no instructions as regards life-sustaining treatment.

The applicants in the proceedings before the Court were Vincent Lambert's parents, and his half-brother and sister. They complained, in the name and on behalf of Vincent Lambert, that the withdrawal of nutrition and hydration would breach the State's obligation under Article 2 of the Convention and would constitute ill-treatment within the meaning of Article 3. Since the withdrawal of nutrition and hydration would also infringe Vincent Lambert's physical integrity, Article 8 would also be breached.

The first decision to withdraw the artificial nutrition was taken by the doctor in charge in April 2013, further to a collective legal procedure. Victor Lambert's wife became involved in this procedure, but not his parents or other relatives. The decision was put into effect on 10 April 2013. However, the applicant's parents applied for a judicial injunction, which was granted on 11 May 2013, ordering the hospital to resume the nutrition and the care of Victor Lambert.

The doctor's second decision to discontinue nutrition and hydration was taken on 11 January 2014 as a result of the collective procedure, following extensive consultations with Vincent Lambert's wife, parents, eight siblings, medical team and doctors (including several doctors outside the hospital). At the request of the parents, the Administrative Court suspended implementation of the decision on the grounds that Vincent Lambert's wishes had been incorrectly assessed. The Administrative Court held the decision of 11 January 2014 as "*a serious and manifestly unlawful breach of Vincent Lambert's right to life*".

In the ensuing proceedings, the *Conseil d'Etat* found in its judgment of 24 June 2014 that the relevant legal provisions authorising physicians to withdraw medical treatment were lawful.

Vincent Lambert's wife, nephew and half-sister, as individual third-party interveners, questioned the standing of the applicants to act on behalf of Vincent Lambert.

Following a detailed review of relevant precedents, the Court found no case comparable to the present case, particularly concerning the question of whether an individual could act in the name and on behalf of a vulnerable person. The Court noted two main criteria to be fulfilled in order to allow such complaints:

- (i) was there a risk that the direct victim would be deprived of effective protection of his or her rights; and
- (ii) was there a conflict between the victim (the patient in the present case) and the applicants?

The Court found that the applicants did not have standing to act in the name and on behalf of Vincent Lambert, since it had not been established that there was a “*convergence of interests*” between the applicants’ assertions and Vincent Lambert’s wishes, but they could act on their own behalf. As to the third-party intervener, Rachel Lambert, who requested leave to represent Victor Lambert, the Court found no legal provision permitting a third-party intervener to represent another person before the Court.

Under Article 2 of the Convention, the Court stressed that the issue in question was the withdrawal or withholding of life-sustaining treatment, and not euthanasia (§§ 124 and 141). It considered the applicants’ complaints solely from the standpoint of the State’s positive obligations.

The Court noted that no consensus existed among the Council of Europe member States in favour of permitting the withdrawal of artificial life-sustaining treatment, although the majority of States appeared to allow it. It considered that in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded a margin of appreciation, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients’ right to life and the protection of their right to respect for their private life and their personal autonomy.

It then examined the gist of the applicants’ complaints relating to the lack of clarity and precision of the existing legislation and the shortcomings in the decision-making process. The Court reviewed the legislative framework, the extent to which account has been taken of the wishes of the patient, the family and the medical personnel, and the possibility of consulting the courts for a decision in the patient’s interests.

The Court concluded that the law (including the notion of “*unreasonable obstinacy*”) did not lack clarity or precision. It also found the legislative framework and the decision-making process compatible with Article 2 requirements in this field, emphasising the quality and breadth of the review by the *Conseil d’Etat*.

**\*\*\*[Bataliny v. Russia](#), no. 10060/07, judgment of 23 July 2015**

TESTING OF A NEW DRUG ON A PATIENT WITHOUT HIS OR HER CONSENT: VIOLATION OF ARTICLE 3

The applicant was held in a psychiatric hospital for two weeks. He alleged, *inter alia*, that he had not been permitted to leave and to have contact with the outside world. He also complained that he had been used for scientific research by being treated with new antipsychotic medication that had not been authorised for sale.

The Court held that the Government had not argued convincingly that the involuntary psychiatric treatment of the applicant had been medically necessary.

One of the key findings of this judgment was that the testing of a new drug on a patient without his or her consent was unacceptable, in the light of international standards, and that it amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

**\*\*\*Pending cases:**

**\*\*\*[V.P. v. Estonia](#), no. 14185/14, communicated on 26 November 2014**  
FAILURE TO PREVENT A PATIENT WITH MENTAL DISORDER AND SUICIDAL IDEATION FROM COMMITTING SUICIDE

The applicant's son suffered from paranoid schizophrenia and had been treated several times in a psychiatric hospital. After attempting to commit suicide, he was taken back to hospital. The following day he jumped out of a window on the twelfth floor of the hospital, where he had been admitted to an intensive-care unit.

The applicant complained, under Article 2 of the Convention, of the authorities' failure to carry out an effective investigation into the circumstances of her son's death. There were no effective provisions enabling the assessment of a person's capacity to exercise his or her will.

**\*\*\*[Maria da Glória Fernandes de Oliveira v. Portugal](#), no. 78103/14, communicated on 22 January 2016**  
FAILURE TO PREVENT A PATIENT WITH MENTAL DISORDER AND SUICIDAL IDEATION FROM COMMITTING SUICIDE

Suffering from mental disorders and from alcohol and drug addiction, the applicant's son had been admitted several times to a psychiatric hospital in Coimbra. He had made repeated suicide attempts.

Following the next suicide attempt, he was hospitalised again but allowed to walk around the hospital premises. On the third day he committed suicide by jumping in front of a train a few metres from the hospital.

The applicant complained, under Article 2 of the Convention, of the authorities' negligence in taking care of her son and of their failure to protect his life.

**\*\*\*[Sablina and Others v. Russia](#), no. 4460/16, communicated on 21 September 2016**  
REMOVAL OF ORGANS WITHOUT THE EXPRESS CONSENT OF THE PERSONS CONCERNED OR THEIR HEIRS

The applicants complain under Article 8 of the Convention that they were denied an opportunity to express their opinion on the extraction of organs from their relative's body. They further submit that Russian laws on organ transplantation are ambiguous and do not provide sufficient

protection from arbitrariness, therefore enabling doctors to perform the removal without informing the relatives or seeking their consent.

(2) Consent to gynaecological examination

**Juhnke v. Turkey, no. 52515/99, judgment of 13 May 2008**

GYNAECOLOGICAL EXAMINATION WITHOUT APPLICANT'S FREE AND INFORMED CONSENT – VIOLATION OF ARTICLE 8

In October 1997 the applicant was arrested by Turkish soldiers on suspicion of membership of an illegal armed organisation, the PKK (Workers' Party of Kurdistan) and handed over to gendarmes stationed in Hakkari (Turkey). In September 1998 she was convicted as charged and sentenced to 15 years' imprisonment. She was released in December 2004 and deported to Germany.

The case concerned, in particular, the applicant's complaint that her detention was unlawful and that during that detention she had been subjected to ill-treatment and a gynaecological examination against her will. She relied on Articles 3, 5 and 8 of the Convention.

The Court, finding that there was no evidence to substantiate the applicant's allegation that she had been subjected to ill-treatment, declared that part of her complaint inadmissible. The Court further found the applicant's allegation that she had been forced to have a gynaecological examination to be unsubstantiated. It therefore held by five votes to two that there had been no violation of Article 3.

However, the Court did find that the applicant had resisted a gynaecological examination until persuaded to agree to it and that, given the vulnerability of a detainee in such circumstances, she could not have been expected to indefinitely resist having such an examination. The Court decided to examine that issue from the point of view of Article 8 and found that there had been an interference with the applicant's private life in that the examination had been imposed on her without her free and informed consent. Indeed, it even considered that she might have been misled into believing that the examination was compulsory. Moreover it had not been shown that that interference was "*in accordance with the law*". The examination in question appeared to have been a discretionary measure taken by the authorities in order to safeguard those members of the security forces who had arrested and detained the applicant against false accusations of sexual assault. That safeguard did not justify seeking to persuade a detainee to agree to such an intrusive and serious interference with her physical integrity, especially given that she had not complained of having been sexually assaulted. The interference had not therefore been "*necessary in a democratic society*" either. Accordingly, the Court held by five votes to two that there had been a violation of Article 8.

“81. The only aim invoked by the Government in carrying out gynaecological examinations on those in custody is to protect the security forces against false allegations of sexual assault. Even if this could in principle be regarded as a legitimate aim, the Court cannot find that the examination carried out in the present case was proportionate to such an aim. While, in a situation where a female detainee complains of a sexual assault and requests a gynaecological examination, the obligation of the authorities to carry out a thorough and effective investigation into the complaint would include the duty promptly to carry out the examination (see, for example, *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 107), a detainee may not be compelled or subjected to pressure to such an examination against her wishes. As noted above, the applicant in the present case made no complaint of sexual assault against those who detained her and did not request a gynaecological examination. No reason has been advanced to suggest that she was likely to do so. The Court finds that the protection of the gendarmes against false allegations is, in any event, not such as to justify overriding the refusal of a detainee to undergo such an intrusive and serious interference with her physical integrity or, as in the present case, seeking to persuade her to give up her express objection to such an examination.

82. In sum, the Court finds that the gynaecological examination which was imposed on the applicant without her free and informed consent has not been shown to have been “in accordance with the law” or to have been “necessary in a democratic society”. There has accordingly been a violation of the applicant’s rights under Article 8 of the Convention.”

***Salmanoğlu and Polattas v. Turkey*, no. 15828/03, judgment of 17 March 2009- violation of Article 3**

**LACK OF CONSENT TO GYNAECOLOGICAL EXAMINATION**

The applicants, who were 16 and 19 years old at the time, were arrested in March 1999 in the context of a police operation against the PKK (the Workers’ Party of Kurdistan). Both girls claim that, during their police custody, they were blindfolded and beaten. One of the two also alleged that she had been sexually harassed and forced to stand for a long time, and had been deprived of food, water and sleep. The other alleged that she had been raped by having a truncheon inserted into her anus.

The applicants were examined between 6 and 12 March 1999 during their police custody by three doctors who all noted that there was no sign of physical violence to their bodies. Both applicants also had a gynaecological examination (a “*virginity test*”) to establish whether they had recently had sexual intercourse; the examinations recorded that the girls were still virgins. On 6 April 1999 Fatma was also given a rectal examination; the doctor noted no sign of intercourse.

Following complaints made by the two applicants on 26 March and 1 June 1999, an investigation was launched by the prosecution authorities. The Hatay Assize Court subsequently decided that criminal proceedings should be brought against the police officers who had questioned the applicants during their police custody.

On 14 April 2000, during the first hearing of the case, the girls confirmed their allegations of ill-treatment. They also submitted that, when brought



before the public prosecutor and judge on 12 March 1999 with a view to their being remanded in custody, they had not made statements about their ill-treatment as they were scared. In particular, they both contended that, during certain medical examinations and when they had made statements to the prosecution, the presence of police officers had intimidated them. The accused police officers denied that they had ill-treated the girls or that they had been present during their medical examinations or when their statements were recorded.

During the criminal proceedings the applicants had further medical examinations of various kinds. In particular, on 23 October 2000 experts from the Istanbul Faculty of Medicine diagnosed them both with post-traumatic stress disorder and one was declared to have a major depressive disorder. Those conclusions were based on the applicants' submissions about the physical, psychological and sexual assault they had endured one and a half years previously. The applicants subsequently underwent psychotherapy. Further reports by the Forensic Medicine Institute of 5 March 2003 and 25 August 2004, on the whole, corroborated those conclusions.

Ultimately, following numerous requests for further medical reports and postponements of hearings, in April 2005 the domestic courts acquitted the police officers on the grounds that there was insufficient evidence against them. Subsequently, in November 2006 that judgment was quashed; however, the criminal proceedings against the police officers were terminated as the prosecution had become time-barred.

In the meantime, in November 1999 the two girls were convicted of membership of an illegal organisation and of throwing Molotov cocktails. They were sentenced to terms of imprisonment amounting to more than 12 and 18 years, respectively.

Relying in particular on Article 3, the applicants alleged that they had been subjected to ill-treatment while in police custody, in particular sexual abuse and rape, and that the investigation into their allegations inadequate. They also alleged that they had been subjected to "*virginity tests*", in breach of Article 14 (prohibition of discrimination).

Finding of a violation of Article 3 under the substantive limb (four votes to three) and unanimously under the procedural limb of Article 3.

"88. Lastly, the Court observes that the applicants were subjected to virginity tests at the start of their detention in police custody (see paragraphs 7 and 9 above). However, the Court notes that the Government have not shown that these examinations were based on and were in compliance with any statutory or other legal requirement. They just submitted that the examinations were carried out following the applicants' complaints of sexual violence and that the latter had consented to the tests. In the latter connection, no evidence of any written consent was submitted by the Government. In assessing the validity of the purported consent, the Court cannot overlook the fact that the first applicant was only sixteen years old at the material time. Nevertheless, even assuming that the applicants' consent was valid, the Court



considers that there could be no medical or legal necessity justifying such an intrusive examination on that occasion as the applicants had yet not complained of sexual assault when the tests were conducted. The tests in themselves may therefore have constituted discriminatory and degrading treatment (see, *mutatis mutandis*, *Juhnke v. Turkey*, no. 52515/99, § 81, 13 May 2008).

89. Having regard to the above, the Court finds that the applicants' medical examinations between 6 and 12 March 1999, as well as the examination of 6 April 1999, fell short of the aforementioned CPT standards and the principles enunciated in the Istanbul Protocol. It concludes that in the present case the national authorities failed to ensure the effective functioning of the system of medical examinations of persons in police custody. Therefore, these examinations could not produce reliable evidence. Consequently, the Court attaches no weight to the findings of the reports of 6, 8, 9 and 12 March and 6 April 1999."

**\*\*\**Konovalova v. Russia*, no. 37873/04, judgment of 9 October 2014**

PRESENCE OF MEDICAL STUDENTS DURING CHILDBIRTH AND PRIVACY RIGHTS OF A PATIENT:  
VIOLATION OF ARTICLE 8

The applicant, who was pregnant, was admitted to the S.M. Kirov Military Medical Academy Hospital on 23 April 1999 after her contractions began. She was handed a booklet issued by the hospital that included a notice warning patients about their possible involvement in the hospital's clinic teaching programme. Later she was informed that her delivery would be attended by medical students. The applicant objected to the presence of medical students during the delivery.

The applicant's civil claim for compensation and a public apology for the intentional delay to her labour and the non-authorised presence of medical students during the birth was unsuccessful before the national courts on the grounds that no medical malpractice could be found, that national law did not require the written consent of a patient to the presence of medical students and, finally, on the grounds that the applicant's evidence concerning her allegedly expressed objections was not substantiated. The District Court relied solely on the doctor's statements in respect of the alleged applicant's objections, however, and did not question other witnesses.

Relying on Article 8, the applicant complained about the unauthorised presence of medical students during the birth. She also claimed a violation of Article 3 since the birth of her child was allegedly intentionally delayed in order to enable the medical students to attend the delivery.

The Court noted the sensitive nature of the medical procedure in question and found an interference with the applicant's private life within the meaning of Article 8 of Convention.

It also noted that the presence of medical students during the delivery was covered by the provisions of national law which pursued educational objectives. However, the Court observed that at the time of the applicant's hospitalisation, the legislation in force did not contain any procedural

safeguards to protect patients' privacy rights. The relevant provisions were not adopted until 2007.

The Court held that neither the hospital nor the domestic courts had addressed the issue in a satisfactory manner. A booklet contained only "*a rather vague reference to ... the study process*" (see § 46) and the mandatory nature of the students' participation was presumed. The question as to whether the applicant was given a choice and was capable of decision-making shortly before and during the birth remained unanswered.

The Court found that the presence of medical students during the birth of the applicant's child did not comply with the requirement of lawfulness of Article 8 § 2 of the Convention on account of the lack of sufficient procedural safeguards against arbitrary interference with the applicant's Article 8 rights in the domestic law at the time.

The Court rejected the complaint under Article 3 concerning the alleged delay of the birth as manifestly ill-founded, relying on the findings of the domestic court concerning the adequacy of the medical treatment.

### (3) Consent to sterilisation operation

**\*\**V.C v. Slovakia*, no. 18968/07, judgment of 8 November 2011**  
 STERILISATION OF ROMA WOMAN DURING DELIVERY OF SECOND CHILD WITHOUT HER INFORMED CONSENT: VIOLATION OF ARTICLES 2 AND 8

The applicant is a Roma woman who was sterilised during the delivery of her second child via Caesarean section on 23 August 2000. Under Article 3 of the Convention the applicant complained that she had been subjected to inhuman and degrading treatment on account of her sterilisation without her full and informed consent, and that the authorities had failed to carry out a thorough, fair and effective investigation into the circumstances surrounding her sterilisation. She also claimed that her Roma ethnicity – clearly stated in her medical record – had played a decisive role in her sterilisation. The applicant's sterilisation has had serious medical and psychological after-effects. She has been treated by a psychiatrist since 2008 and continues to suffer from the fact that she was sterilised. She has also been ostracised by the Roma community. Under Article 8 of the Convention the applicant complained that her right to respect for her private and family life had been violated as a result of her sterilisation without her full and informed consent. Under Article 12 of the Convention the applicant complained that her right to found a family had been breached on account of her sterilisation without her full and informed consent. She also complained under Articles 13 and 14.

The Court noted that sterilisation amounted to a major interference with a person's reproductive health status and, involving manifold aspects of personal integrity, required informed consent when the patient was an adult of sound mind. However, from the documents submitted, the applicant had

apparently not been fully informed about the status of her health, the proposed sterilisation and/or its alternatives. The applicant's sterilisation, as well as the way in which she had been requested to agree to it, must therefore have made her feel fear, anguish and inferiority. The applicant's sterilisation had been in violation of Article 3. There had been no violation of Article 3 as concerned the applicant's allegation that the investigation into her sterilisation had been inadequate. Given its earlier finding of a violation of Article 3, the Court did not consider it necessary to examine separately under Article 8 whether the applicant's sterilisation had breached her right to respect for her private and family life. It nevertheless found that Slovakia had failed to fulfil its obligation under Article 8 to respect private and family life in that it did not ensure that particular attention was paid to the reproductive health of the applicant as a Roma. There had therefore been a violation of Article 8 concerning the lack of legal safeguards at the time of the applicant's sterilisation giving special consideration to her reproductive health as a Roma. The Court found that there had been no violation of Article 13. It held that there was no need to examine separately the applicant's complaints under Articles 12 and 14.

\*\*\*[\*N.B. v. Slovakia\*](#), no. 29518/10, judgment of 12 June 2012

STERILISATION OF MINOR ROMA WOMAN WITHOUT HER CONSENT: VIOLATION OF ARTICLES 3 AND 8

The applicant, who is of Roma ethnic origin, was sterilised during the delivery of her second child via Caesarean section. At that time she was a minor. No legal representatives were present during the delivery. The hospital file contained an entry with typed information signed by the applicant that she had requested the sterilisation procedure. A sterilisation commission approved the applicant's sterilisation – allegedly carried out at her request – *ex post facto* on the grounds that the measure had been necessary because of her health.

The applicant denied that she had signed a request for sterilisation. She remembered having signed some papers during the delivery with the help of a staff member. However, due to the circumstances, she had been unable to read the document herself. She believed that her sterilisation had not been a life-saving measure and had therefore not been necessary. She pointed out the segregation in the hospital between women of Roma ethnicity and others, who had been given different rooms. She claimed that her Roma ethnicity had been decisive for her sterilisation. As a result of the operation, she had suffered from serious physical and mental health problems. Neither the civil and criminal proceedings nor the proceedings before the Constitutional Court had acknowledged a breach of her rights. She had not received appropriate compensation.

The applicant complained under Article 3 of the Convention that she had been subjected to inhuman and degrading treatment and that the

investigation into her case had not been effective. The sterilisation had affected her private and family life and was in breach, *inter alia*, of her rights under Article 8 of the Convention.

The Court, relying on the judgment of 8 November 2011 concerning the above-mentioned case of *V.C v. Slovakia* (no. 18968/07), reiterated and stressed the vulnerable position of Roma women in Slovakia, “*who had been at particular risk due to a number of shortcomings in domestic law and practice at the relevant time*” (see § 96). Since the result of the domestic proceedings was that the legal conditions for the sterilisation procedure had not been met, the member State had failed to protect the applicant effectively. The Court found a violation of Article 3, since the applicant, as a depressive woman who was unable to have children, had suffered severely due to the sterilisation operation. It also confirmed the breach of her right under Article 8, since there had been no effective legal safeguards.

**\*\*\*[\*Gauer and Others v. France\*](#), no. 61521/08, decision of 23 October 2012**

STERILISATION OF MENTALLY DISABLED WOMEN WITHOUT THEIR CONSENT: INADMISSIBLE

The applicants, five young women with mental disabilities, underwent surgery resulting in their sterilisation for the purposes of contraception. They were not informed of the nature of the operation and their consent was not sought. The young women were employed at a local work-based support centre and placed under the responsibility of the Association for Adults and Young People with Disabilities. In September 2000 the Association lodged a complaint, together with an application to join the proceedings as a civil party. The association’s civil-party application was declared inadmissible. The applicants asked for an *ad hoc* administrator to be appointed so that they could be designated as civil parties and represented in the proceedings. That request was refused. The guardianship judge appointed the chairman of the Union of Family Associations of the *département* of Yonne to represent the applicants, who then applied to join the proceedings as civil parties. The court discontinued the proceedings. None of the applicants’ appeals was successful.

Lodging the complaint before the Strasbourg Court, the applicants also included the parents of a young woman with disabilities resident at the CAT (*le Centre d’Aide par le Travail*), members of the ADHY (*l’Association de Défense des Handicapés de l’Yonne*), and the husband of one of the applicants. They complained that the young women who had undergone the surgery had not been represented from the start of the proceedings; they also complained that the proceedings had been unfair and objected that their appeal to the Court of Cassation had been declared inadmissible. The young women submitted that there had been an interference with their physical integrity as a result of the sterilisation which had been carried out without

obtaining their consent, and alleged a violation of their right to respect for their private life and their right to found a family. They submitted that they had been subjected to discrimination as a result of their disability.

The Government objected only on the basis of non-compliance with the six-month time-limit, submitting that the decision of the investigation chamber of the Paris Appeal Court of 12 March 2007 upholding the dismissal of the proceedings had to be taken into account as the final decision. They argued that the later decision of the French Constitutional Council had no impact on that decision and provided no remedies. The Court shared the Government's view and declared the application inadmissible.

**\*\*\*[I.G., M.K. and R.H. v. Slovakia](#), no. 15966/04, judgment of 13 November 2012**

STERILISATION OF ROMA WOMEN WITHOUT THEIR CONSENT: VIOLATION OF ARTICLES 3 AND 8 IN RESPECT OF THE FIRST AND SECOND APPLICANTS

The applicants are Slovakian nationals of Roma ethnic origin. The first applicant was sterilised during the delivery of her second child by Caesarean section. She was not told that she had been subjected to tubal ligation or that she had been sterilised, nor did she receive any information about post-sterilisation treatment. She first learned that the sterilisation had been carried out while reviewing her medical files with her lawyer. At the time of sterilisation the applicant was 16 years old and her legal guardians had not consented to the operation.

The second applicant was sterilised during her second delivery by Caesarean section. At the date of delivery she was 17 years old and not legally married. Neither the second applicant nor her parents were informed of her sterilisation and they never signed any document consenting to it. She also suffered from serious medical side-effects from her sterilisation.

The third applicant was sterilised during her fourth delivery by Caesarean section. Before the delivery she was asked to sign a paper. The third applicant alleged that she had signed the document without understanding its contents. The third applicant submitted that she had not given informed consent of her own free will to the sterilisation. She also suffered medical side-effects from the sterilisation.

The applicants complained under Article 3 of the Convention that they had been victims of forced and unlawful sterilisation in a public hospital and that the Slovakian authorities had failed to undertake a thorough, effective and prompt investigation into the circumstances thereof. Under Article 8 of the Convention the applicants complained that their sterilisation had seriously interfered with their private and family lives. Under Article 12 of the Convention the applicants complained that they had been denied their right to found a family as a result of their sterilisation. Under Article 13 of the Convention the applicants complained that they had no effective remedy

at their disposal for their complaints. The applicants also complained under Article 14 that their sterilisations had been based on grounds of sex, race, colour, membership of a national minority and ethnicity.

The Court found that, in the case of the first and second applicants, there had been substantive and procedural violations of Article 3 as well as a breach of Article 8.

The Court confirmed that the applicants had been in a vulnerable position. It relied on the principles, already set out in the judgments concerning the above-mentioned case of *V.C v. Slovakia*, no. 18968/07, and of *N.B. v. Slovakia*, no. 29518/10. The fact that the first applicant (who at the time of the operation was a minor) had only learned about her sterilisation some three years later did not exclude the violation of Article 3. In that connection, taking into account all the circumstances of the case, such as the definitive and severe nature of the sterilisation, the age of the applicant and her vulnerability as a woman of Roma ethnic origin, the sterilisation operation amounted to degrading treatment that attained the threshold of severity within the meaning of Article 3. The same applied to the situation of the second applicant, since her right to respect for human freedom and dignity had been violated. As to Article 8, the Court reiterated that the respondent State had failed to comply with its positive obligation under Article 8 to protect the reproductive health of vulnerable women of Roma ethnicity by not establishing sufficient legal safeguards to protect them from unlawful practices and the shortcomings of the domestic law.

### *F. Transgender issues*

**\*\*\*[Y.Y. v. Turkey](#), no. 14793/08, judgment of 10 March 2015, ECHR 2015 (extracts)**

REFUSAL BY DOMESTIC AUTHORITIES TO GRANT AUTHORISATION FOR GENDER REASSIGNMENT SURGERY: VIOLATION OF ARTICLE 8

The applicant was registered as female at the time of the application. Feeling that (s)he was in fact male, the applicant applied to court for authorisation to undergo sex reassignment surgery (SRS) in accordance with Turkish law. The applicant's first claim was submitted in 2005 but was finally rejected in 2007 by the national courts on the grounds that the authorisation was only to be granted when the individual was proven to be unable to procreate. In the court's view, the applicant did not satisfy the requirements laid down in Article 40 of the Civil Code since his permanent inability to procreate had not been attested by medical experts. In 2013 a new request from the applicant was granted on the grounds that it had been established that gender reassignment was needed to ensure the applicant's mental health, and it had been proven by the applicant that he lived as a man in every respect and was suffering as a result of his situation.



The applicant complained under Article 8 of a breach of his right to respect for his private life, in particular referring to the sterilisation requirement set out in Article 40 of the Civil Code.

The Court found that the refusal by the domestic courts to authorise the SRS constituted an interference with the applicant's right to respect for his private life and also for his autonomy in so far as it had repercussions on his right to gender identity and to personal development (§§ 65 et seq). It concluded that the sterilisation requirement, which had been the reason for the domestic court's refusal to grant the authorisation, could not be considered sufficient justification for the interference (§ 121).

**Pending cases:**

\*\*\*[\*S.V. v. Italy\*](#), no. 55216/08, communicated on 20 March 2016  
 REFUSAL OF DOMESTIC COURTS TO GRANT A NAME CHANGE BECAUSE OF THE ABSENCE OF GENDER REASSIGNMENT SURGERY

This case concerns the refusal of the domestic courts to grant the applicant a change of her name in the absence of gender reassignment surgery.

The Court gave notice of the application to the Italian Government and put questions to the parties concerning the right to respect for private life under Article 8 of the Convention and whether such an interference had been provided for by law and was necessary within the meaning of Article 8 § 2 of the Convention.

\*\*\*[\*Bogdanova v. Russia\*](#), no. 63378/13, communicated on 19 February 2015<sup>2</sup>  
 REFUSAL OF PRISON AUTHORITIES TO PROVIDE A DETAINEE – A TRANSEXUAL WOMAN – WITH HORMONE REPLACEMENT THERAPY

The case concerns a detained transsexual woman who, prior to her detention, had undergone male-to-female gender reassignment surgery.

Following her arrest in June 2012 she had at first been detained in a temporary detention facility and later – after her conviction became final on 4 September 2012 – in a correctional colony. On 15 March 2015 she was transferred to a tuberculosis hospital.

After her arrest, the applicant's hormone therapy had been disrupted by the prison authorities despite numerous complaints from the applicant and her need for it because of her previous gender reassignment surgery. Eventually, the applicant was prescribed hormone replacement therapy, for which she would have had to pay herself. The applicant did not have the necessary resources.

According to the applicant, the authorities also breached her right to privacy by allegedly revealing her transsexual status and therefore making her a victim of abuse inside the prison.

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<sup>2</sup> Communication together with *Nikulin v. Russia*, no. 30125/06 and 20 other applications.

The applicant complains under Articles 3 and 13 about the lack of adequate medical treatment and the lack of an effective domestic remedy in this respect. Her complaint also refers to the worsening of her conditions of detention due to the disclosure by the authorities of her gender reassignment surgery.

### ***G. Ethical issues concerning HIV/serious illnesses***

#### (1) Threat of expulsion

***Arcila Henao v.the Netherlands, (no. 13669/03, decision of 24 June 2003***  
 EXPULSION OF AN HIV-POSITIVE DRUG OFFENDER; ADEQUATE MEDICAL TREATMENT:  
 INADMISSIBLE

“According to established case-law, aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State. However, in exceptional circumstances the implementation of a decision to remove an alien may, owing to compelling humanitarian considerations, result in a violation of Article 3 (see *D. v. the United Kingdom*, judgment of 2 May 1997, Reports of Judgments and Decisions 1997-III, p. 794, § 54). In that case the Court found that the applicant’s deportation to St. Kitts would violate Article 3, taking into account his medical condition. The Court noted that the applicant was in the advanced stages of Aids. An abrupt withdrawal of the care facilities provided in the respondent State together with the predictable lack of adequate facilities as well as of any form of moral or social support in the receiving country would hasten the applicant’s death and subject him to acute mental and physical suffering. In view of those very exceptional circumstances, bearing in mind the critical stage which the applicant’s fatal illness had reached and given the compelling humanitarian considerations at stake, the implementation of the decision to remove him to St. Kitts would amount to inhuman treatment by the respondent State in violation of Article 3 (see *D. v. the United Kingdom*, cited above, pp. 793–794, §§ 51–54).

The Court has therefore examined whether there is a real risk that the applicant’s expulsion to Colombia would be contrary to the standards of Article 3 in view of his present medical condition. In so doing, the Court has assessed the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on the applicant’s state of health (see *S.C.C. v. Sweden* (dec.), no. 46553/99, 15 February 2000, unreported).

The Court notes that the applicant stated on 16 August 2002 that he felt well and had worked, although he did suffer from certain side-effects of his medication. The Court further notes that, according to the most recent medical information available, the applicant’s current condition is reasonable but may relapse if treatment is discontinued. The Court finally notes that the required treatment is in principle available in Colombia, where the applicant’s father and six siblings reside.

In these circumstances the Court considers that, unlike the situation in the above-cited case of *D. v. the United Kingdom* or in the case of *B.B. v. France* (no. 39030/96, Commission’s report of 9 March 1998, subsequently struck out by the Court by judgment of 7 September 1998, Reports 1998-VI, p. 2595), it does not appear that the applicant’s illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the



applicant's circumstances in Colombia would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention.

Although the Court accepts the seriousness of the applicant's medical condition, it does not find that the circumstances of his situation are of such an exceptional nature that his expulsion would amount to treatment proscribed by Article 3 of the Convention."

***N. v. the United Kingdom* [GC], no. 26565/05, judgment of 27 May 2008**  
NO VIOLATION OF ARTICLE 3, NOT NECESSARY TO EXAMINE COMPLAINT UNDER ARTICLE 8  
[DELETED THE VOTES]

The applicant, who is HIV positive, alleged that if she were returned to Uganda she would not have access to the medical treatment she required and that this would give rise to violations of Articles 3 and 8 of the Convention.

The Court summarised its case-law concerning expulsion cases where the applicant claimed to be at risk of suffering a violation of Article 3 on the grounds of ill-health, noting that it had not found such a violation since its judgment in *D v. the United Kingdom* (application no. 30240/96) on 21 April 1997, where "very exceptional circumstances" and "compelling humanitarian considerations" were at stake. In the latter case the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin, and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

The Court pointed out that aliens who were subject to expulsion could not in principle claim any entitlement to remain in the territory of one of the States which had ratified the European Convention on Human Rights (a Contracting State) in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that an applicant's circumstances, including his or her life expectancy, would be significantly reduced if he or she were to be removed from the Contracting State did not in itself constitute sufficient grounds to give rise to breach of Article 3. The decision to remove an alien who was suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State might raise an issue under Article 3, but only in very exceptional cases, where the humanitarian grounds against the removal were compelling, such as in *D v. the United Kingdom*.

The Court reiterated that although many of the rights it contained had implications of a social or economic nature, the Convention was essentially directed at the protection of civil and political rights. Furthermore, inherent in the whole of the Convention was a search for a fair balance between the demands of the general interest of the community and the requirement of protecting the individual's fundamental rights. Advances in medical science,

together with social and economic differences between countries, meant that the level of treatment available in the Contracting State and the country of origin might vary considerably. Article 3 did not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

Finally, the Court observed that, although the applicant's case concerned the expulsion of a person with an HIV and Aids-related condition, the same principles had to apply to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering, pain and reduced life expectancy and require specialised medical treatment which might not be so readily available in the applicant's country of origin or which might be available only at substantial cost.

Although the applicant applied for, and was refused, asylum in the United Kingdom, she did not complain before the Court that her removal to Uganda would put her at risk of deliberate, politically motivated ill-treatment. Her claim under Article 3 was based solely on her serious medical condition and the lack of sufficient treatment available for it in her home country.

In 1998 the applicant was diagnosed as having two Aids-defining illnesses and a high level of immunosuppression. As a result of the medical treatment she had received in the United Kingdom her condition was now stable. She was fit to travel and would remain fit as long as she continued to receive the basic treatment she needed. The evidence before the national courts indicated, however, that if the applicant were to be deprived of her current medication, her condition would rapidly deteriorate and she would suffer ill-health, discomfort, pain and death within a few years.

According to information collated by the World Health Organisation, antiretroviral medication was available in Uganda but, through lack of resources, it was received by only half of those in need. The applicant claimed that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she came. It appeared that she had family members in Uganda, although she claimed that they would not be willing or able to care for her if she were seriously ill.

The United Kingdom authorities had provided the applicant with medical and social assistance at public expense during the nine-year period it had taken her asylum application to be determined by the domestic courts and her claims under Articles 3 and 8 of the Convention to be determined by the Court. However, that did not in itself entail a duty on the part of the United Kingdom to continue to provide for her.

Concluding that the applicant's case did not disclose "*very exceptional circumstances*", the Court found that implementation of the decision to remove her to Uganda would not give rise to a violation of Article 3.

“50. The Court accepts that the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda. The applicant is not, however, at the present time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, must involve a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and Aids worldwide.

51. In the Court's view, the applicant's case cannot be distinguished from those cited in paragraphs 36-41 above. It does not disclose very exceptional circumstances, such as in *D. v. the United Kingdom* (cited above), and the implementation of the decision to remove the applicant to Uganda would not give rise to a violation of Article 3 of the Convention.”

**\*\**Kiyutin v. Russia*, no. 2700/10, judgment of 15 March 2011**

REFUSING A RESIDENCE PERMIT TO A FOREIGNER BECAUSE HE WAS HIV-POSITIVE WAS DISCRIMINATORY: VIOLATION OF ARTICLE 8 IN CONJUNCTION WITH ARTICLE 14

The applicant, a national of Uzbekistan, was born in the then USSR (Union of Soviet Socialist Republics) and has lived since 2003 in the Oryol region of Russia. He married a Russian national in July 2003 and had a daughter with her the following year. In the meantime, he had applied for a residence permit and was asked to undergo a medical examination during which he tested positive for HIV. His application for residence was refused by reference to a legal provision preventing the issuing of a residence permit to HIV-positive foreigners. The applicant challenged the refusal in court, claiming that the authorities should have taken into account his state of health and his family ties in Russia. The Russian courts rejected his appeals, citing the same legal provision. The applicant complained under Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life and the home) of the Convention.

The Court noted at the outset that the right of a foreigner to enter or settle in a given country was not guaranteed by the Convention and there was no obligation under the Convention to respect the choice of married couples as to where they would like to live. However, since he had established a family in Russia, his situation had to be considered under Article 8. Accordingly, Article 14 was applicable in conjunction with Article 8 and Russia was under a legal obligation to exercise immigration control in a non-discriminatory manner. Being the spouse of a Russian national and the father of a Russian child, the applicant had been in an analogous situation to that of other foreign nationals seeking to obtain a family-based residence permit in Russia. He had been treated differently because of a legal provision which provided that any application for a residence permit had to be refused if the foreigner was unable to show that he or she was not HIV-positive. The Court emphasised that people living with HIV represented “*a particularly vulnerable group in society*” (§ 63) which had been discriminated against in many ways in the past, be it due to common

misconceptions about the spreading of the disease, or to prejudices linked to the way of life believed to be at its origin. Consequently, if a restriction on fundamental rights applied to such a particularly vulnerable group, then the State's margin of appreciation was substantially narrower and there had to be very weighty reasons for the restrictions in question. Finding that the mere presence of an HIV-positive individual in the country was not in itself a threat to public health and noting that the exclusion of residence for foreigners who were HIV-positive was explicitly provided for in a "blanket" and indiscriminate fashion in Russian law – which also provided for the deportation of non-nationals who were found to be HIV-positive – the Court held that the applicant had been a victim of discrimination on account of his health status, in violation of Article 14 taken together with Article 8 of the Convention.

(2) Isolation

***Enhorn v. Sweden*, no. 56529/00, ECHR 2005-I, judgment of 25 January 2005**

COMPULSORY ISOLATION OF PERSON INFECTED WITH THE HIV VIRUS TO PREVENT THE SPREAD OF THIS INFECTIOUS DISEASE: VIOLATION OF ARTICLE 5 § 1

“44. Taking the above principles into account, the Court finds that the essential criteria when assessing the “lawfulness” of the detention of a person “for the prevention of the spreading of infectious diseases” are whether the spreading of the infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.

45. Turning to the instant case, it is undisputed that the first criterion was fulfilled, in that the HIV virus was and is dangerous to public health and safety.

46. It thus remains to be examined whether the applicant's detention could be said to be the last resort in order to prevent the spreading of the virus, because less severe measures had been considered and found to be insufficient to safeguard the public interest.

47. In a judgment of 16 February 1995, the County Administrative Court ordered that the applicant be kept in compulsory isolation for up to three months under section 38 of the 1988 Act. Thereafter, orders to prolong his deprivation of liberty were continuously issued every six months until 12 December 2001, when the County Administrative Court turned down the county medical officer's application for an extension of the detention order. Accordingly, the order to deprive the applicant of his liberty was in force for almost seven years.

Admittedly, since the applicant absconded several times, his actual deprivation of liberty lasted from 16 March 1995 until 25 April 1995, 11 June 1995 until 27 September 1995, 28 May 1996 until 6 November 1996, 16 November 1996 until 26 February 1997, and 26 February 1999 until 12 June 1999 – almost one and a half years altogether.

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48. The Government submitted that a number of voluntary measures had been attempted in vain during the period between September 1994 and February 1995 to ensure that the applicant's behaviour would not contribute to the spread of the HIV infection. Also, they noted the particular circumstances of the case, notably as to the applicant's personality and behaviour, as described by various physicians and psychiatrists; his preference for teenage boys; the fact that he had transmitted the HIV virus to a young man; and the fact that he had absconded several times and refused to cooperate with the staff at the hospital. Thus, the Government found that the involuntary placement of the applicant in hospital had been proportionate to the purpose of the measure, namely to prevent him from spreading the infectious disease.

49. The Court notes that the Government have not provided any examples of less severe measures which might have been considered for the applicant in the period from 16 February 1995 until 12 December 2001, but were apparently found to be insufficient to safeguard the public interest.

50. It is undisputed that the applicant failed to comply with the instruction issued by the county medical officer on 1 September 1994, which stated that he should visit his consulting physician again and keep to appointments set up by the county medical officer. Although he kept to three appointments with the county medical officer in September 1994 and one in November 1994, and received two home visits by the latter, on five occasions during October and November 1994 the applicant failed to appear as summoned.

51. Another of the practical instructions issued by the county medical officer on 1 September 1994 was that, if the applicant was to have a physical examination, an operation, a vaccination or a blood test or was bleeding for any reason, he was obliged to tell the relevant medical staff about his infection. Also, he was to inform his dentist about his HIV infection. In April 1999, before the County Administrative Court, the county medical officer stated that during the last two years, while on the run, the applicant had sought medical treatment twice and that it had been established that both times he had said that he had the HIV virus, as opposed to the period when he had absconded between September 1995 and May 1996, during which the applicant had failed on three occasions to inform medical staff about his virus.

52. Yet another of the practical instructions issued by the county medical officer on 1 September 1994 required the applicant to abstain from consuming such an amount of alcohol that his judgment would thereby be impaired and others put at risk of being infected with HIV. However, there were no instructions to abstain from alcohol altogether or to undergo treatment against alcoholism. Nor did the domestic courts justify the deprivation of the applicant's liberty with reference to his being an "alcoholic" within the meaning of Article 5 § 1(e) and the requirements deriving from that provision.

53. Moreover, although the county medical officer stated before the County Administrative Court in February 1995 that, in his opinion, it was necessary for the applicant to consult a psychiatrist in order to alter his behaviour, undergoing psychiatric treatment was not among the practical instructions issued by the county medical officer on 1 September 1994. Nor did the domestic courts during the proceedings justify the deprivation of the applicant's liberty with reference to his being of "unsound mind" within the meaning of Article 5 § 1(e) and the requirements deriving from that provision.

54. The instructions issued on 1 September 1994 prohibited the applicant from having sexual intercourse without first having informed his partner about his HIV infection. Also, he was to use a condom. The Court notes in this connection that,

despite his being at large for most of the period from 16 February 1995 until 12 December 2001, there is no evidence or indication that during that period the applicant transmitted the HIV virus to anybody, or that he had sexual intercourse without first informing his partner about his HIV infection, or that he did not use a condom, or that he had any sexual relations at all for that matter. It is true that the applicant infected the 19-year-old man with whom he had first had sexual contact in 1990. This was discovered in 1994, when the applicant himself became aware of his infection. However, there is no indication that the applicant transmitted the HIV virus to the young man as a result of intent or gross neglect, which in many of the Contracting States, including Sweden, would have been considered a criminal offence.

55. In these circumstances, the Court finds that the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest. Moreover, the Court considers that by extending over a period of almost seven years the order for the applicant's compulsory isolation, with the result that he was placed involuntarily in a hospital for almost one and a half years in total, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty.

56. There has accordingly been a violation of Article 5 § 1 of the Convention.”

### (3) Confidentiality

#### ***L. v. Finland*, No. 20511/03, judgment of 17 July 2008**

DOMESTIC AUTHORITIES' FAILURE TO PROTECT, AT THE RELEVANT TIME, THE APPLICANT'S PATIENT RECORDS AGAINST UNAUTHORISED ACCESS. (HIV + CONFIDENTIALITY): VIOLATION OF ARTICLE 8

“38. The protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention (see *Z v. Finland*, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, §§ 95-96).

39. The Court notes that at the beginning of the 1990s there were general provisions in Finnish legislation aiming at protecting sensitive personal data. The Court attaches particular relevance to the existence and scope of the Personal Files Act of 1987 (see paragraph 19 above). It notes that the data controller had to ensure under section 26 that personal data were appropriately secured against, among other things, unlawful access. The data controller also had to make sure that only the personnel treating a patient had access to his or her patient record.

40. Undoubtedly, the aim of the provisions was to secure personal data against the risk of unauthorised access. As noted in *Z v. Finland*, the need for sufficient

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guarantees is particularly important when processing highly intimate and sensitive data, as in the instant case, where, in addition, the applicant worked in the same hospital where she was treated. The strict application of the law would therefore have constituted a substantial safeguard for the applicant's right secured by Article 8 of the Convention, making it possible, in particular, to police strictly access to an disclosure of health records.

41. However, the County Administrative Board found that, as regards the hospital in issue, the impugned health records system was such that it was not possible to retroactively clarify the use of patient records as it revealed only the five most recent consultations and that this information was deleted once the file had been returned to the archives. Therefore, the County Administrative Board could not determine whether information contained in the patient records of the applicant and her family had been given to or accessed by an unauthorised third person (see paragraph 10 above). This finding was later upheld by the Court of Appeal following the applicant's civil action. The Court for its part would also note that it is not in dispute that at the material time the prevailing regime in the hospital allowed for the records to be read also by staff not directly involved in the applicant's treatment.

42. It is to be observed that the hospital took ad hoc measures to protect the applicant against unauthorised disclosure of her sensitive health information by amending the patient register in summer 1992 so that only the treating personnel had access to her patient record and the applicant was registered in the system under a false name and social security number (see paragraph 7 above). However, these mechanisms came too late for the applicant.

43. The Court of Appeal found that the applicant's testimony about the events, such as her colleagues' hints and remarks beginning in 1992 about her HIV infection, was reliable and credible. However, it did not find firm evidence that her patient record had been unlawfully consulted (see paragraph 15 above).

44. The Court notes that the applicant lost her civil action because she was unable to prove on the facts a causal connection between the deficiencies in the access security rules and the dissemination of information about her medical condition. However, to place such a burden of proof on the applicant is to overlook the acknowledged deficiencies in the hospital's record keeping at the material time. It is plain that had the hospital provided a greater control over access to health records by restricting access to health professionals directly involved in the applicant's treatment or by maintaining a log of all persons who had accessed the applicant's medical file, the applicant would have been placed in a less disadvantaged position before the domestic courts. For the Court, what is decisive is that the records system in place in the hospital was clearly not in accordance with the legal requirements contained in section 26 of the Personal Files Act, a fact that was not given due weight by the domestic courts.

45. The Government have not explained why the guarantees provided by the domestic law were not observed in the instant hospital. The Court notes that it was only in 1992, following the applicant's suspicions about an information leak, that only the treating clinic's personnel had access to her medical records. The Court also observes that it was only after the applicant's complaint to the County Administrative Board that a retrospective control of data access was established (see paragraph 11 above).

46. Consequently, the applicant's argument that her medical data were not adequately secured against unauthorised access at the material time must be upheld.

47. The Court notes that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorised access occurring in the first place. Such protection was not given here.

48. The Court cannot but conclude that at the relevant time the State failed in its positive obligation under Article 8 § 1 of the Convention to ensure respect for the applicant's private life.

49. There has therefore been a violation of Article 8 of the Convention."

**Armonienė v. Lithuania, no. 36919/02 and Biriuk v. Lithuania, no. 23373/03, judgments of 25 November 2008**

FAILURE TO PROVIDE PROTECTION OF PRIVACY DUE TO SEVERE LEGISLATIVE LIMITATIONS ON JUDICIAL DISCRETION IN REDRESSING THE DAMAGE AND THEREFORE ON DETERRING THE RECURRENCE OF ABUSES OF PRESS FREEDOM (HIV + CONFIDENTIALITY): VIOLATION OF ARTICLE 8 IN BOTH CASES

The Court held by six votes to one, in both cases, that there had been a violation of Article 8 concerning the low ceiling imposed on damages awarded to them on account of a serious breach of their privacy by a national newspaper.

See *Armonienė v. Lithuania* judgment:

"40. More specifically, the Court has previously held that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. The above considerations are especially valid as regards the protection of the confidentiality of a person's HIV status (cf. Council of Europe materials, paragraphs 20-21 above). The disclosure of such data may dramatically affect his or her private and family life, as well as the individual's social and employment situation, by exposing that person to opprobrium and the risk of ostracism (see *Z v. Finland*, judgment of 25 February 1997, *Reports* 1997-I, §§ 95-96).

41. It is in the light of the above considerations that the Court has now to examine whether the State has fulfilled its positive obligation to secure respect for the applicant's right to respect for private and family life.

(b) Application of these general principles to the present case

42. The Court notes that the publication of the article about the state of health of the applicant's husband, namely that he was HIV-positive, as well as the allegation that he was the father of two children by another woman who was also suffering from Aids (see paragraph 6 above), were of a purely private nature and therefore fell within the protection of Article 8 (see, for example, *Dudgeon v. the United Kingdom*, cited above, § 41). The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life. In this respect the Court sees no reason to depart from the conclusion of the national



courts, which acknowledged that there had been interference with the family's right to privacy.

43. The Court will next examine whether there existed a public interest justifying the publication of this kind of information about the applicant's husband. However, the Court sees no such legitimate interest and agrees with the finding of the Vilnius City Third District Court, which held that making public information about the husband's state of health, indicating his full name, surname and residence, did not correspond to any legitimate public interest (paragraph 8 above). In the Court's view, the publication of the article in question, the sole purpose of which was apparently to satisfy the prurient curiosity of a particular readership, cannot be deemed to contribute to any debate of general interest to society (see, among many authorities, *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003). Consequently, given that the balance lay in favour of the individual's right to privacy, the State had an obligation to ensure that the husband was able effectively to enforce that right against the press.

44. Furthermore, the Court attaches particular significance to the fact that, according to the newspaper, the information about the husband's illness had been confirmed by employees of the Aids centre. It cannot be denied that publication of such information in the biggest national daily newspaper could have a negative impact on the willingness of others to take voluntary tests for HIV (cf. paragraph 21 above). In this context, it is of special importance that domestic law provides appropriate safeguards to discourage any such disclosures and the further publication of personal data.

45. The Court takes into account that the national law at the material time did contain norms protecting the confidentiality of information about the state of health of a person. It has regard to the existence of the judicial guidelines to be followed if the right to privacy of a person has been breached (see paragraphs 12-19 above). The Court also notes that the domestic courts indeed awarded the husband compensation for non-pecuniary damage. However the principal issue is whether the award of LTL 10,000 was proportionate to the damage he sustained and whether the State, in adopting Article 54 § 1 of the Law on the Provision of Information to the Public, which limited the amount of such compensation payable by the mass media, fulfilled its positive obligation under Article 8 of the Convention.

46. The Court agrees with the Government that a State enjoys a certain margin of appreciation in deciding what "respect" for private life requires in particular circumstances (cf. *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§ 62-63, *Reports* 1996-IV; *X and Y v. the Netherlands*, 26 March 1985, § 24, Series A no. 91). The Court also acknowledges that certain financial standards based on the economic situation of the State are to be taken into account when determining the measures required for the better implementation of the foregoing obligation. The Court likewise takes note of the fact that the Member States of the Council of Europe may regulate questions of compensation for non-pecuniary damage differently, as well as the fact that the imposition of financial limits is not in itself incompatible with a State's positive obligation under Article 8 of the Convention. However, such limits must not be such as to deprive the individual of his or her privacy and thereby empty the right of its effective content.

47. The Court recognises that the imposition of heavy sanctions on press transgressions could have a chilling effect on the exercise of the essential guarantees of journalistic freedom of expression under Article 10 of the Convention (see, among many authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 113-114,

ECHR 2004-XI). However, in a case of an outrageous abuse of press freedom, as in the present application, the Court finds that the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and sufficiently deterring the recurrence of such abuses, failed to provide the applicant with the protection that could have legitimately been expected under Article 8 of the Convention. This view is confirmed by the fact that the impugned ceiling on judicial awards of compensation contained in Article 54 § 1 of the Law on the Provision of Information to the Public was repealed by the new Civil Code soon after the events in the present case (see paragraph 33 above).

48. In the light of the foregoing considerations, the Court rejects the Government's preliminary objection as to the applicant's victim status and concludes that the State failed to secure the applicant's right to respect for her family's private life.

There has therefore been a violation of Article 8 of the Convention."

**Colak and Tsakiridis v .Germany, nos. 77144/01 and 35493/05,  
judgment of 5 March 2009**

FAILURE TO INFORM APPLICANT ABOUT COMPANION'S INFECTION WITH HIV – NO VIOLATION OF ARTICLES 2, 8 OR 6 § 1

Relying on Article 2, Article 6 § 1 and Article 8 of the European Convention on Human Rights, the applicant complained that she had been denied a fair trial in proceedings she had brought against her doctor for failing to inform her that her companion was suffering from Aids and that the domestic courts had refused to award her compensation for being denied the knowledge that she was HIV-positive. The Court considered that the domestic courts had had sufficient regard to her right to life and physical integrity; it further found that their assessment of the facts had not been arbitrary and that the principle of equality of arms had been complied with. Consequently, the Court held – unanimously – that there had been no violation of Article 2 of the Convention and no violation of Article 6 § 1. It further held, by six votes to one, that there had been no violation of Article 8.

"29. An event, however, which does not result in death may only in exceptional circumstances disclose a violation of Article 2 of the Convention (see *Acar and Others v. Turkey*, nos. 36088/97 and 38417/97, § 77, 24 May 2005; *Makaratzis v. Greece* [GC], no. 50385/99, § 51, ECHR 2004-XI; and *Tzekov v. Bulgaria*, no. 45500/99, § 40, 23 February 2006). Those may be found in a lethal disease. Having regard to the particular circumstances of the present case, the Court starts on the assumption that the present case raises an issue as to the applicant's right to life.

30. Having regard to the specific sphere of medical negligence, the Court reiterates that the positive obligations under Article 2 may be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the physicians concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained (see *Calvelli and Ciglio*, cited above, § 51).

31. The Court observes at the outset that the applicant does not contest that the Government pursues a general policy of informing both the public and the medical profession with an aim of preventing new infections with HIV. The Court further

## BIOETHICS AND THE CASE-LAW OF THE COURT

observes that domestic law provides the possibility of bringing an action for damages before the civil courts under sections 823 and 847 of the Civil Code and, notably in section 34 of the Criminal Code, provides a general legal framework for resolving the conflict of interests between a physician's duty of confidence owed towards one patient and another patient's right to physical integrity. Having regard to the complexity of the subject matter, the Court accepts that it was not possible for the legislator to issue stricter rules on the solution of all conceivable conflicts of interests even before they arose. The Court further notes that section 172 of the German Code of Criminal Procedure provides the aggrieved party with the possibility of lodging a request for a court decision against the discontinuation of criminal proceedings. As established by the Court in its decision on admissibility in the present case, the applicant did not, however, exhaust domestic remedies in this respect.

32. The Court concludes that the German legal system provides for legal remedies which, in general, meet the requirements of Article 2 as they afford parties injured through medical negligence both criminal and civil compensation proceedings.

33. The Court further notes that, under the pertinent domestic law, a patient requesting damages from a physician for medical malpractice generally carries the burden of proof for the requisite causal connection between the physician's negligence and the damage to his or her health. According to the established domestic case-law, only a "gross error in treatment" would lead to a reversal of the burden of proof to the physician. Such gross error is generally assumed if the physician clearly breaches well-established medical rules (see paragraph 20, above). In the instant case the Frankfurt Court of Appeal, in its judgment on the applicant's compensation claims, expressly acknowledged that the defendant physician had violated his professional duties towards the applicant by failing to inform her about her companion's infection. That court considered, however, that this behaviour could not be qualified as a "gross error in treatment", as the physician had not disregarded medical standards in a blindfold way, but had merely overestimated his duty of confidence while balancing the conflicting interests. It followed that it was not possible to apply a less strict rule on the burden of proof in the instant case. Accordingly, it was up to the applicant to prove that she contracted the virus after January 1993, when the physician himself was informed about her companion's HIV status. Relying on expert opinion, the Court of Appeal considered that it could not be excluded that the applicant had contracted the virus before January 1993, when the physician himself learned about the companion's infection.

34. The Court notes that at the time the Frankfurt Court of Appeal rendered the instant judgment in 1999, no established domestic case-law existed as to whether a family physician was obliged to disclose a patient's HIV status to the patient's partner even against the patient's express will. The Court further observes that the three judges deciding on the case in the first-instance court, unlike the Court of Appeal judges, did not consider that the physician had been obliged to disclose her partner's status to the applicant. Under these circumstances, it does not appear contrary to the spirit of Article 2 of the Convention if the Court of Appeal, while fully acknowledging that the physician acted in breach of his professional duties, did not consider that the latter committed a "gross error in treatment" which would have led to a reversal of the burden of proof. This does not exclude the possibility that a higher standard would have to be applied to a physician's diligence in cases which might arise after the Frankfurt Court of Appeal's judgment given in the instant case, which clarified the physician's professional duties in these specific circumstances, had been published.

35. Having regard to the above considerations, the Court considers that the German courts, and in particular the Frankfurt Court of Appeal, had sufficient regard to the applicant's right to life and physical integrity. It follows that the domestic courts did not fail to interpret and apply the provisions of domestic law relating to the applicant's compensation claims in the spirit of the Convention.

36. Accordingly, the domestic authorities did not fail to comply with their positive obligations owed towards the applicant under Article 2 of the Convention. For the same reasons, the Court considers that there has not been a violation of the applicant's rights under Article 8 of the Convention.”

\*\*\*[I.B. v. Greece](#), no. 552/10, judgment of 3 October 2013, ECHR 2013  
DISMISSAL OF AN HIV-POSITIVE EMPLOYEE AS A RESULT OF STAFF PRESSURE: VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8

The applicant had told some of his colleagues that he feared he had contracted HIV and this was confirmed while he was absent on annual leave. The news spread throughout the entire company and his colleagues called informally for his dismissal. The applicant's employer invited a doctor to explain the HIV infection and its means of transmission to the staff. However, even after this intervention, approximately half of the applicant's colleagues signed a letter demanding that he be laid off. Two days before the applicant's return from leave, the employer dismissed him. The Court of Cassation, quashing the lower court's decision, confirmed the lawfulness of the dismissal on the grounds of the need to preserve a good working environment in the company.

Under Article 14 together with Article 8 of the Convention, the applicant complained of interference with his private life by his employer. He also complained that his dismissal had been stigmatising and discriminatory.

The Court pointed out that the applicant had suffered discrimination and stigmatisation because of the dismissal and noted its grave impact on his private life. Articles 8 and 14, taken together, were therefore applicable.

Finding that the applicant had been treated differently from, and less favourably than, his colleagues, the Court focussed on the question of the justification for that treatment and on the extent of the State's margin of appreciation in this regard. The Court found a clear trend to protect persons who had tested HIV-positive, even though not all the member States of the Council of Europe have enacted specific legislation in this regard. Having found the explanation of the Court of Cassation insufficient, the Court held that there had been a violation.

\*\*\*[Y. v. Turkey](#), no. 648/10, decision of 17 February 2015  
PROTECTION OF MEDICAL DATA ON THE ADMISSION OF AN HIV-POSITIVE PATIENT TO HOSPITAL: INADMISSIBLE

The applicant was admitted to hospital after collapsing. He was unconscious on arrival at the hospital. His relatives disclosed to the ambulance crew the fact that he was HIV-positive. The applicant

complained about the hospital passing that information on to both medical and administrative staff, and alleged a violation of Article 8 as regards his right to respect for his private life.

The Court underlined the importance of the confidentiality of individuals' medical records and data, in particular concerning vulnerable people who have tested HIV-positive. However, it noted that, in certain circumstances, the disclosure of such information might be relevant and necessary in the interests of the patient concerned, the other patients, and the medical staff.

After carefully weighing the interests of all concerned, the Court found the application to be manifestly ill-founded because the data protection was ensured national law (which provided for disciplinary and criminal sanctions), and because the information about the applicant's status had been passed only to the staff involved in his medical care.

#### (4) Preventive measures/Access to treatment

***Shelley v. the United Kingdom*, no. 23800/06, decision of 4 January 2008**  
LACK OF NEEDLE EXCHANGE PROGRAMMES IN PRISONS: INADMISSIBLE

The applicant, a prisoner, instructed solicitors as he was concerned that the provision of tablets instead of needle exchange programmes in prisons was failing sufficiently to address the risks caused by the sharing of infected needles. Such risks were not confined to drug users but also involved other prisoners or prison staff who could be accidentally infected.

The applicant complained under Article 2 of the Convention that the authorities were failing to take preventive steps in respect of a known real and immediate risk to life through the spread of viruses in prison. The authorities had also failed in their positive obligation under Article 3 to adequately secure his health and well-being and under Article 8 to protect his safety from bodily threats from others or from the transmission of disease. He relied *inter alia* on the reports of the European Committee for the Prevention of Torture which state that prisoners are entitled to health care of the same standard as that available to those in the community.

“To date the Court's case-law has been limited to holding that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2. This has so far imposed systemic and structural obligations, such as to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives, and to provide for an effective independent judicial system to be set up 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 (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 49, ECHR 2002-I; *Byrzykowski v. Poland*, no. 11562/05, § 104, 27 June 2006; *Šilih v. Slovenia*, no. 71463/01, § 117, 28 June 2007).

So far as preventive health is concerned, there is no authority that places any obligation under Article 8 on a Contracting State to pursue any particular preventive

health policy. The case-law discloses that complaints have been more commonly brought against preventive measures taken by States to safeguard general health (such as the obligation to use safety helmets, pedestrian crossings or subways, and compulsory seatbelts e.g. 8707/79, (Dec.) 13.12.79 DR 18 p. 255 (contrast cases where the complaint was about the requirement to undergo medical treatment such as vaccinations: e.g. 7154/75, (Dec.) July 12, 1978, 14 D.R. 31). While it is not excluded that a positive obligation might arise to eradicate or prevent the spread of a particular disease or infection, the Court is not persuaded that any potential threat to health that fell short of the standards of Articles 2 or 3 would necessarily impose a duty on the State to take specific preventive steps. Matters of health care policy, in particular as regards general preventive measures, are in principle within the margin of appreciation of the domestic authorities who are best placed to assess priorities, use of resources and social needs (*mutatis mutandis*, *Osman v. the United Kingdom*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, § 116.

... Giving due leeway to decisions about resources and priorities and to a legitimate policy to try to reduce drug use in prisons, and taking account of the fact that some preventive steps have been taken (disinfecting tablets) and that the authorities are monitoring developments in needle exchange programmes elsewhere, the Court concludes that the respondent Government have not failed to respect the applicant's private life.

It follows that this part of the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.”

The applicant also contended that there had been a breach of Article 14 on the basis that prisoners in England and Wales were – without proper justification – treated less favourably, as a group, than people in the community.

“... the Court finds that the difference in treatment falls within the margin of appreciation and considers that it may be regarded, at the current time, as being proportionate and supported by objective and reasonable justification. This part of the application must also be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.”

**[Aleksanyan v. Russia, no. 46468/06, judgment of 22 December 2008](#)**

ACCESS TO ANTI-RETROVIRAL MEDICINE AND SPECIALISED MEDICINE IN PRISON: VIOLATION OF ARTICLE 3

“145. The Court observes that the HAART treatment was prescribed to the applicant for the first time in November 2006. The doctors concluded that the applicant could be kept in the remand prison provided that he received proper treatment and underwent regular monitoring of his health in a specialised medical institution. However, the applicant's medical file does not contain any clear indication that the HAART treatment was administered in the first half of 2007.

146. The Court further notes that it was not until 10 July 2007 that the applicant signed a written statement accepting the HAART treatment. As transpires from the parties' submissions, such a statement was a pre-requisite for commencement of the HAART treatment. There is no information indicating that the applicant refused any treatment before June 2007. The Court concludes that the HAART treatment was not proposed to the applicant between November 2006, when it was recommended, and June 2007.

147. As to the following period, the Court notes that the applicant's medical file and official reports produced by the Government attested that on several occasions the applicant refused "an examination", "injections", and "treatment" (the first such entry in the medical file is dated 15 June 2007). However, those documents did not specify what kind of treatment was offered to the applicant and what examinations he was supposed to undergo. The Court reiterates that the authorities of the penitentiary institution should have kept a record of the applicant's state of health and the treatment he underwent while in detention (see *Khudobin v. Russia*, no. 59696/00, § 83, ECHR 2006-XII (extracts)). Logically, such a medical record should contain sufficient information specifying what kind of treatment the patient was prescribed, what treatment he actually received, who and when administered it, how the applicant's state of health was monitored, etc (see the 3rd General Report of the CPT, quoted in the "Relevant International Instruments" part above). If the applicant's medical file is not specific enough in these respects (as in the case at hand), the Court may make inferences. Furthermore, the Court observes that in September 2007 the investigator recommended that the prison authorities ensure a medical examination of the applicant and the administration of the HAART treatment to him. In the circumstances the Court concludes that, in all probability, the applicant did not receive the HAART treatment from the prison pharmacy.

148. That finding, however, is not decisive. First of all, the Court does not consider that in the circumstances the authorities were under an unqualified obligation to administer the HAART treatment to the applicant free of charge. The Court is aware of the fact that modern anti-retroviral drugs remain very expensive (see, *mutatis mutandis*, the cases of *Karara v. Finland*, no. 40900/98, Commission decision of 29 May 1998; see also *S.C.C. v. Sweden* (dec.), no. 46553/99, 15 February 2000; and *Arcila Henao v. The Netherlands* (dec.), no. 13669/03, 24 June 2003). The Court refers to its findings in the recent case of *N. v. the United Kingdom* ([GC], no. 26565/05, § 44, 27 May 2008), where it recognised that "advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably". That case concerned the provision of free health care to an alien suffering from Aids. In the Court's opinion, broadly the same principle applies in the area of provision of health care to detained nationals: the Contracting States are bound to provide all medical care that their resources might permit.

149. Secondly, as follows from the applicant's medical file, he did not depend on the pharmacy's stock and could receive necessary medication from his relatives. The applicant did not allege that procuring those medicines imposed an excessive financial burden on him or on his relatives (cf. *Mirilashvili v. Russia*, (dec.), no. 6293/04, 10 July 2007, and *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, 29 November 2007). In such circumstances the Court is prepared to accept that the absence of the anti-retroviral drugs in the prison pharmacy was not, as such, contrary to Article 3 of the Convention.

150. The Court notes, however, that the applicant's complaint concerns not so much access to the necessary drugs as the authorities' refusal to place him in a specialised clinic. The Court accepts that complex medicinal treatment often requires constant supervision by specialist doctors, and taking drugs without such supervision may cause more harm than good. As follows from the official reports produced by the Government, the applicant insisted on his placement in a specialised hospital in order to undergo the HAART treatment. Therefore, the next question to be answered is whether that was a legitimate claim, or, as the Government suggested, a mere pretence.

151. The Court wishes to recall certain facts which, in its opinion, are crucial for understanding the applicant's situation. From the Government's submissions it follows that the prison hospital was equipped and staffed to treat a broad range of illnesses, in particular those prevalent in the Russian prison system, such as tuberculosis. However, it is clear that the prison hospital did not have a department specialised in the treatment of Aids. The Court notes that one of the doctors in the prison hospital had undergone training in HIV diagnostics. However, there is no evidence that that training included anti-retroviral therapy. Furthermore, there is no information that the HAART therapy has ever been administered within the prison hospital, and that the medical staff working there had the necessary experience and practical skills for administering it.

152. The Court notes that, among other departments, the prison hospital had a department for infectious diseases, where the applicant was placed in October 2007. According to Decree no. 170 of the Ministry of Health (see the "Relevant Domestic Law" part above), if there was no specialised clinic available, a patient suffering from Aids could be placed in an infectious diseases hospital. The text of the Decree shows that even in domestic terms an infectious diseases hospital is not regarded as a "specialised clinic" for the treatment of Aids: it is a substitute where no specialised clinic is available.

153. The Court further notes that on 23 October 2007 the applicant was examined in the Moscow Aids Centre which, indisputably, was a "specialised clinic". The doctors concluded that the applicant should undergo further in-patient examination and treatment in that Centre. On 26 October 2007 the applicant was admitted to the prison hospital. Five days later the investigator in charge of the applicant's case decided that the applicant's diseases could not be treated in the conditions of the remand prison and asked the court to release the applicant on bail. However, ten days later the investigator changed his mind and refused the application for release on bail. The applicant's medical file does not contain any evidence that between 31 October and 9 November 2007 the applicant underwent any new medical examination which would rebut the conclusions of the earlier report. If there is any explanation for the sudden change in the investigator's position, it does not pertain to the medical needs of the applicant.

154. It is true that in the following weeks the applicant refused examination by the prison doctors. The Court admits that in certain circumstances the refusal to undergo examination or treatment may suggest that the applicant's state of health is not as critical as he claims (see *Gelfmann v. France*, cited above, § 56). However, in the circumstances of the present case the applicant's attitude was understandable. Notwithstanding a serious deterioration in the applicant's health, and despite the specialist doctors' clear recommendation that he should be transferred to an outside specialised clinic, he remained in the prison hospital. Furthermore, the prison doctors attested that the applicant was fit to support the continuing detention and could participate in the criminal proceedings (see the court's ruling of 15 November 2007), despite the fact that (a) the most recent medical examination had reached the opposite conclusion, and (b) since then the applicant had not undergone any new comprehensive examination, for whatever reason.

155. On 21 December 2007 the Court, having examined the evidence before it, decided to obtain more information about the applicant's state of health. It indicated, under Rule 39 of the Rules of Court, that the Government and the applicant should form a bi-partisan medical commission which would answer a number of questions, formulated by the Court. The Government replied that the creation of such commissions would be contrary to the domestic legislation. However, they did not



refer to any law which would prevent the examination of a patient by a mixed medical commission, to include doctors of his choice. The Court further observes that the applicant's health was examined on several occasions by mixed commissions made up of doctors from various clinics. In any event, the State "should not deny the possibility to receive medical assistance from other sources, such as the detainee's family doctor or other qualified doctors" (see *Sarban v. Moldova*, no. 3456/05, § 82, 4 October 2005). In the circumstances the Court considers that the Government's refusal to form a mixed medical commission was arbitrary. The Court will therefore draw adverse inferences from the State's refusal to implement the interim measure.

156. To sum up, the Court concludes that as from the end of October 2007, at the very least, the applicant's medical condition required his transfer to a hospital specialised in the treatment of Aids. The prison hospital was not an appropriate institution for these purposes.

157. Finally, the Court observes that it does not detect any serious practical obstacles for the immediate transfer of the applicant to a specialised medical institution. Thus, the Moscow Aids Centre (a clinic which would most probably have been the applicant's destination in the event of his transfer from the prison hospital) was located in the same city, and it was prepared to accept the applicant for in-patient treatment. It appears that the applicant was able to assume most of the expenses related to the treatment. Furthermore, in view of the applicant's state of health and his previous conduct, the Court considers that the security risks he might have presented at that time, if any, were negligible compared to the health risks he faced (see *Mouisel v. France*, no. 67263/01, §§ 47, ECHR 2002-IX). In any event, the security arrangements made by the prison authorities in Hospital no. 60 did not appear very complicated.

158. In the final analysis, the Court considers that the national authorities failed to take sufficient care of the applicant's health to ensure that he did not suffer treatment contrary to Article 3 of the Convention, at least until his transfer to an external haematological hospital on 8 February 2008. This undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment. There has therefore been a violation of Article 3 of the Convention."

**\*\**A.B. v. Russia*, no. 1439/06, judgment of 14 October 2010**

INADEQUATE MEDICAL ASSISTANCE PROVIDED TO HIV-POSITIVE DETAINEE: VIOLATION OF ARTICLES 3 AND 5 § 1

The applicant was arrested in May 2004 on suspicion of fraud and was placed in a remand prison in St Petersburg. Whilst he was awaiting the end of the investigation in his case, and pending trial, his detention was continuously extended. In October 2006 he was sentenced to five and a half years' imprisonment. According to the applicant, upon his admission to the remand prison, he had been diagnosed as HIV-positive and he had also been suffering from hepatitis C since 1997. He was placed in solitary confinement in a cell in the prison wing accommodating prisoners serving life sentences. The applicant complained that the prison cells were in a deplorable state, without ventilation, heating or hot water, that medical staff rarely visited him and provided no medication when they did. The applicant

never received any antiviral treatment for his HIV, nor was he admitted to hospital, due to lack of space. He relied in particular on Article 3 and Article 5 § 1 of the Convention.

The Court noted that the authorities had made no attempt to justify his protracted and repeatedly extended detention, nor to assess his physical or psychological aptitude for it. The Court concluded that it was not necessary to examine the physical conditions in which A.B. had been detained as the fact of his solitary confinement was enough to find a violation of Article 3. Regarding the medical assistance provided to A.B., the Court noted that, although the World Health Organisation and national legislation alike had recommended conducting specific blood tests not less than once a year in respect of HIV-positive people, A.B. had never undergone such tests. The Court held that A.B. had not been provided with the minimum medical supervision for the timely treatment of his HIV infection while in detention. Accordingly, he had been subjected to inhuman and degrading treatment, in violation of Article 3. A violation of Article 5 § 1 of the Convention was also found.

**\*\*[Logvinenko v. Ukraine](#), no. 13448/07, judgment of 14 October 2010**

INADEQUATE MEDICAL TREATMENT OF HIV-POSITIVE DETAINEE: VIOLATION OF ARTICLE 3 AND 13

The applicant is currently serving a life sentence for murder. Prior to his detention he was diagnosed with tuberculosis of the lungs and later on with advanced-stage HIV (Aids). According to the applicant, throughout the time he spent in detention the medical assistance he received was grossly inadequate. In particular, his state of health was not supervised systematically, and neither were the doctors' recommendations to carry out specific medical tests in order to monitor and treat his tuberculosis followed through by the prison authorities. He was never treated for HIV and never underwent specific blood tests crucial for determining whether HIV-therapy needed to be provided urgently. In addition, in terms of the physical conditions of his detention, the applicant was mainly locked up in his cell, and had limited opportunities to wash, shave or exercise in the open air. The applicant complained under Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the Convention.

The Court noted that the applicant's general state of health appeared to have deteriorated during his stay in prison. Although some tests had been carried out and some medication had been given to him, the medical treatment on the whole had not been prompt, coherent or regular. As regards the HIV, for over eight years, no tests had been carried out, nor had any discussion about any treatment taken place. In addition, the physical conditions in which he had been detained had not been reasonably adapted to his state of health. The Court concluded that the applicant had suffered inhuman or degrading treatment as a result of the absence of comprehensive

medical supervision and treatment and that there had been a violation of Article 3.

**\*\**Shchebetov v. Russia*, no. 21731/02, judgment of 10 April 2012**

MEDICAL TREATMENT OF HIV-POSITIVE DETAINEE WAS NOT INADEQUATE: NO VIOLATION;  
ARTICLE 2 AND ARTICLE 3 INADMISSIBLE

The applicant, a Russian national who was born in 1972 and lived until his arrest in the town of Yakutsk, had spent some years in prison for theft and robbery. In April 2005 he again was sentenced to nine years' imprisonment for aggravated robbery. The applicant was found to have tuberculosis and HIV when tested in prison in 1998 and 2002 respectively, even though his earlier medical tests of 1997, when he had been in a temporary detention facility, had been negative. Relying on Articles 2, 3 and 13 of the Convention, he complained that he had been infected with HIV and tuberculosis whilst in detention, that he had not received appropriate medical treatment, that he had not had an effective remedy in respect of his health-related complaints and that his correspondence with the Court had been censored and delayed.

The Court noted that the materials in the case file did not provide a sufficient evidential basis to find "*beyond reasonable doubt*" that the Russian authorities were responsible for the applicant's contraction of the HIV infection and therefore found that there had been no violation of Article 2 of the Convention. The Court reiterated that irrespective of whether or not an applicant became infected while in detention, the State did have a responsibility to ensure treatment for prisoners in its charge, and a lack of adequate medical treatment of serious health problems not suffered from prior to detention may amount to a violation of Article 3 (see *Hummatov v. Azerbaijan*, nos. 9852/03 and 13413/04, 29 November 2007, §§ 108 et seq.). However, the material available to the Court showed that the Russian authorities had utilised all the means at their disposal in the light of the correct diagnosis of the applicant's condition, prescribing appropriate prophylactic treatment and admitting the applicant to medical institutions for in-depth examinations. The part of the application dealing with alleged violation of Article 3 of the Convention on account of inadequate medical assistance was rejected as being manifestly ill-founded. The Court declared the complaint concerning the applicant's infection with HIV in detention and the authorities' failure to effectively investigate the incident admissible and the remainder of the application inadmissible and stated that there had been no violation of Article 2 of the Convention on account of the applicant's contraction of the HIV virus in detention or on account of the authorities' failure to carry out a thorough and expeditious investigation into the applicant's complaint concerning his infection with HIV.

**\*\*\*[Claes v. Belgium](#), no. 43418/09, judgment of 10 January 2013**

DETENTION FOR OVER FIFTEEN YEARS IN THE PSYCHIATRIC WING OF A PRISON WITHOUT APPROPRIATE MEDICAL CARE AND WITH NO HOPE OF CHANGE: VIOLATION OF ARTICLES 3 AND 5

This case is similar to the cases of *Dufoort v. Belgium*, no. 43653/09, judgment of 10 January 2013, and *Swennen v. Belgium*, no. 53448/10, judgment of 10 January 2013.

The applicant, who had raped his under-age sisters, was held to be not criminally responsible for his actions. He was diagnosed with severe mental disabilities. Between 1978 and 1994 he had been arrested several times after committing new sexual assaults, but had been released each time. Since 1994, following a decision by the Mental Health Board made on the basis of a psychiatrist's report, he has been held continuously (with the exception of a period of twenty-two months outside prison) in the psychiatric wing of Leuven prison. He has had access to different prison psychiatrists, without having been prescribed specific treatment or medical supervision. The applicant requested that the Belgian State authorities find him a place in an appropriate external facility; however, that proved impossible.

Under Article 3 the applicant complained of being subjected to inhuman or degrading treatment, since he has been detained for over fifteen years in the psychiatric wing of a prison without any prospect of rehabilitation or adequate care.

Finding a violation of Article 3, the Court noted the structural problems of the Belgian prison system as regards mentally-ill persons, stressing that “*psychiatric wings are not suitable places of detention for people suffering from mental disorders, because of the general lack of staff, the poor quality and lack of continuity in the treatment provided, the age of the buildings, the overcrowding and the structural lack of capacity in non-prison psychiatric facilities*” (see paras. 98-99). The Belgian authorities did not protect the applicant from acute hardship and distress exceeding the unavoidable suffering linked to the detention.

Furthermore, the Court held that there had been a violation of Article 5 § 1(e) of the Convention. Although the applicant's detention had been ordered after a court judgment, decisions by the Mental Health Board and a psychiatrist's report, and therefore “*in accordance with a procedure prescribed by law*”, the detention was unlawful because the applicant had not been held in an adequate institution. The Court also found a violation of Article 5 § 4 with regard to the review of lawfulness that could be conducted by the Mental Health Board, in particular of the question whether the applicant was being held in an appropriate facility.

**\*\*\*[Salakhov and Islyamova v. Ukraine](#), no. 28005/08, judgment of 14 March 2013**

LACK OF ADEQUATE MEDICAL TREATMENT OF HIV-POSITIVE DETAINEE; MENTAL SUFFERING OF A MOTHER DUE TO HER SON'S DEATH IN PRISON: VIOLATION OF ARTICLE 3

The second applicant is the mother of the first applicant, who died in August 2008, shortly after the application had been lodged with the Court.

After his arrest in 2007, the first applicant, who had been HIV positive since September 2005, was placed in detention. He was taken on several occasions to the Simferopol pre-trial detention centre, where he was examined and was found to be in good health. After a hospital examination in early June 2008 the first applicant was diagnosed as having HIV at the fourth clinical stage, with pneumonia, candidiasis and other serious infections, but his hospitalisation was rejected on the grounds that there was no urgent need for it.

On 17 June 2008 the Court issued an interim order under Rule 39 indicating to the Ukrainian Government the need to transfer the first applicant to hospital immediately for treatment. He was transferred to a hospital three days later but, after his fresh conviction on 4 July 2008, he remained in detention until his release on 18 July 2008. During that period of detention he remained in a critical state of health, guarded by police officers and handcuffed to his bed. He died on 2 August 2008 at home.

The investigations into the death of the first applicant initiated at the request of the second applicant were closed and reopened several times.

The second applicant, maintaining the application of her son after his death, complained under Articles 2 and 3 of the Convention about the failure of the State to protect the life and health of the first applicant. In spite of her best efforts to save the life of her son, she had had to watch helplessly his suffering and his death. The complaints concerned the question of the adequacy of the medical treatment provided to the first applicant during his detention, the requisite medical treatment in view of the first applicant's sharply deteriorating health, the handcuffing of the first applicant in the hospital, and the effectiveness of the domestic investigations.

The crucial question as to if and when the first applicant had informed the authorities about his HIV-positive status was disputed between the parties. After reviewing the parties' submissions the Court concluded that the authorities had first been informed about the first applicant's status in early June 2008.

When assessing the complaint under Article 3 regarding the question whether adequate medical treatment had been provided to the first applicant during detention, the Court noted the weak position of a detained applicant in respect of the burden of proof. Relying on its case-law, the Court observed the difficulties for detained applicants to obtain evidence, since all relevant documents were kept by the authorities. The Court has therefore

lowered the requisite level of substantiation for such applicants, requiring only a detailed account of the facts from them and shifting the burden of proof to the Government. The Court noted the failure of the Government to submit copies of any relevant medical documents and held that there had been a violation of Article 3 of the Convention.

Referring to the medical treatment in hospital, the Court also held that there had been a violation of Article 3, in particular on account of the handcuffing of a seriously ill detainee for twenty-eight days. In respect of the complaint under Article 2, the Court found a violation under its procedural limb on the grounds that the investigation into the death of the first applicant had been ineffective to the extent that even the personnel in charge could not have been identified.

The Court determined that the second applicant was a direct victim and held that there had been a violation of Article 3, since she had had to witness her son's slow death without the possibility of helping him, in spite of making every effort to save his life or at least to relieve his suffering.

**\*\*\*Centre of legal resources on behalf of Valentin Câmpeanu v. Romania, no. 47848/08, [GC], judgment of 17 July 2014**

INSUFFICIENT MEDICAL TREATMENT OF MENTALLY DISABLED HIV-POSITIVE PERSON:  
VIOLATION OF ARTICLE 2 AND OF ARTICLE 13 IN CONJUNCTION WITH ARTICLE 2

Valentin Câmpeanu, a man of Roma ethnicity, grew up in an orphanage. His father is unknown, and his mother abandoned him at birth. In 1990 he was diagnosed as HIV-positive. He was then diagnosed with “*profound mental retardation, an IQ of 30 and HIV*” and was categorised accordingly as belonging to the “*severe*” disability group. He was transferred to the Craiova Centre for Disabled Children. In 2003, the State care of Valentin Câmpeanu was terminated on the ground that he had recently turned eighteen and was enrolled in any form of education. The Commission ordered that he should be transferred to the Poiana Mare Neuropsychiatric Hospital (“the PMH”). The PMH informed the Child Protection Commission that they could not admit Valentin Câmpeanu, who had been diagnosed with HIV and mental disability, since the hospital lacked the facilities necessary to treat individuals with such a diagnosis. The Centre for Recovery and Rehabilitation of Persons with a Disability refused to accept Mr Câmpeanu, on the basis that “*he was infected with HIV*”. The Commission eventually identified the Cetate-Dolj Medico-Social Unit (“the CMSU”) as an appropriate establishment where Valentin Câmpeanu could be placed. In 2004 he was admitted to the CMSU. After some period of time spent there, a medical examination concluded that he suffered from “*severe mental retardation, HIV infection and malnutrition*”. As the CMSU lacked the facilities needed to treat Mr Câmpeanu's health condition, he was transferred to PMH. However, being unable to eat or use the toilet without assistance, the staff at the PMH refused to help him, allegedly for fear that



they would contract the HIV virus. In February 2004 Valentin Câmpeanu died.

The case concerns issues of access to justice for individuals with disabilities and of their ill-treatment in long-stay institutions.

The application was submitted under Article 34 of the Convention by a Romanian non-governmental organisation, the Centre for Legal Resources (“the CLR”), which had not received any powers or instructions from Mr Câmpeanu. Mr Câmpeanu died before the application was lodged with the Court, The CLR had initiated various proceedings before the national courts in order to clarify the circumstances of his death. The Court stressed the fact that the CLR’s capacity to act for Mr Câmpeanu had not been questioned by the national authorities.

In its judgment, the Court specified the requirements for a *de facto* representative in cases when this representative was neither the victim of the alleged violations, nor the deceased person’s next-of-kin. It emphasised the vulnerability of Mr Câmpeanu who, on account of his mental disabilities, was neither capable of acting for himself nor had been provided with any legal representatives by the domestic authorities. Taking a similar approach to that taken under Article 5 § 4 concerning the right to judicial review for “*persons of unsound mind*”, the Court introduced this special procedural safeguard in order to protect the interests of mentally disabled persons incapable of acting for themselves.

As to the merits, the Court held Romania liable for multiple violations of the Convention (of Article 2 in both its substantive and procedural limbs, and of Article 13 in conjunction with Article 2). It found that the Romanian authorities had failed not only to provide Mr Câmpeanu with the most basic medical care while he was alive but also to clarify the circumstances of his death.

**\*\*\*[Savinov v. Ukraine](#), no. 5212/13, judgment of 22 October 2015**

LACK OF ADEQUATE MEDICAL TREATMENT OF HIV-POSITIVE DETAINEE: VIOLATION OF ARTICLES 3 AND 13

The applicant had tested HIV-positive many years before the start of his detention in 2006. However, in the course of the detention he was found at least twice to be “*practically healthy*”. Some years after the first diagnosis, he was diagnosed HIV-positive at clinical stage 4, with tuberculosis, chronic hepatitis and other serious illnesses. The applicant’s repeated requests for release were at first rejected on the grounds that he had been convicted of serious crimes. He was eventually released because of his serious health problems in June 2013.

Relying on Article 3 of the Convention, the applicant complained about the inadequate medical services afforded to him by the national authorities between December 2006 and March 2013.

The Court reiterated the principle set out in its case-law that the lack of appropriate medical care of a detained person amounts to treatment contrary to Article 3 of the Convention. However, it also stressed the need for “*particularly thorough scrutiny*” of the allegations. The Court emphasised the primary responsibility of the first-instance courts when it came to the assessment of the facts and reiterated the subsidiary nature of its own role. It also noted the Government’s task to provide “*credible and convincing*” evidence of adequate medical care in detention facilities.

On the basis of these principles, the Court observed the failure of the particular authorities in the case to provide the applicant with adequate treatment between November 2011 and March 2013, finding a violation of Article 3. Noting the lack of an effective and accessible remedy available to the applicant concerning the possibility of obtaining medical treatment, the Court also found a violation of Article 13 of the Convention.

**\*\*\*[Catalin Eugen Micu v. Romania](#), no. 55104/13, judgment of 5 January 2016**

POOR PRISON CONDITIONS AND ALLEGED INFECTION WITH HEPATITIS C DURING DETENTION: VIOLATION OF ARTICLE 3

The applicant, a Romanian citizen, sentenced to ten years in prison, was detained in different prisons. In Bucharest-Jilava he shared a cell measuring 33.96 sq. m with twenty-seven prisoners. They had to share one bathroom equipped with two toilets, two basins and two showers. In the cell there were not enough tables and chairs to eat meals.

During his detention, the applicant was hospitalised several times. He was diagnosed with hepatitis C.

He complained under Article 3 of the Convention of the poor conditions of the prison in Bucharest-Jilava. Furthermore, he claimed that he had been infected with hepatitis C while in detention and that he had not received adequate medical treatment.

The Court found a violation of Article 3 on account of the poor prison conditions, but it could not confirm the allegations of the applicant regarding his infection with hepatitis C and the lack of medical treatment during detention. The Court considered that the burden of proof lay with the applicant, who had failed to prove his allegations.

**\*\*\*[Karpulyenko v. Ukraine](#), no. 15509/12, judgment of 11 February 2016**

LACK OF ADEQUATE MEDICAL TREATMENT AVAILABLE TO HIV-POSITIVE DETAINEE AND LACK OF EFFECTIVE INVESTIGATIONS AFTER HIS DEATH: VIOLATION OF ARTICLES 2 AND 3<sup>3</sup>

The applicant’s son was detained in December 2009. In May 2010 he tested positive for HIV and in April 2011 he was diagnosed with pulmonary

<sup>3</sup>. More generally, as to the unlawful detention without adequate medical assistance and in inhuman conditions, see [Mozer v. the Republic of Moldova and Russia](#) [GC], no. 11138/10, ECHR 2016.



tuberculosis. After being urgently hospitalised, the applicant's son died in November 2011. According to the official autopsy statement, he died of HIV-related diseases. The applicant's requests to open investigations into her son's death and his ill-treatment by police officers during his arrest were refused.

The applicant complained under Articles 2 and 3 that the authorities had been responsible for the death of her son: they had not provided him with adequate medical care, and there had not been an effective domestic investigation into his alleged ill-treatment during the arrest.

The Court found a violation of Article 2, under both its substantive and procedural limbs, concluding that the authorities in charge had not complied with their positive obligation to protect the health and life of the applicant's son. He had not been provided with adequate treatment following his HIV diagnosis, and his other illnesses had been treated insufficiently. The Court found that there had been no effective investigations into the ill-treatment of the applicant's son or into his death. It also found a violation of Article 3 under its substantive limb, referring to the established fact that the applicant's son had suffered some serious injuries during his detention that could not be explained by the domestic authorities or subsequently by the Government.

**\*\*\*[Blokhin v. Russia](#) [GC], no. 47152/06, ECHR 2016, judgment of 23 March 2016**

30-DAY DETENTION OF A 12-YEAR-OLD BOY WITHOUT ADEQUATE MEDICAL CARE FOLLOWING UNFAIR PROCEEDINGS: VIOLATION OF ARTICLES 3, 5 § 1, 6 §§ 1 AND 3(C) AND (D)

The applicant, who at the time of the relevant period of detention in 2005 was twelve years old and suffering from attention deficit hyperactivity disorder ("ADHD") and enuresis, was arrested and taken to a police station on suspicion of extorting money from a nine-year old neighbour. Relying on the applicant's confession and the statements of the alleged victim and the latter's mother during the pre-investigation inquiry, the authorities found it established that the applicant had committed criminal offences. Since the applicant had not reached the age of criminal responsibility, no criminal proceedings were instituted against him. However, a district court ordered his placement in a temporary detention centre for juvenile offenders for a period of thirty days for the purpose of behavioural correction and in order to prevent him from committing further acts of delinquency.

For the purposes of this report, the aspect of the judgment to be noted is the alleged failure by the authorities to provide the applicant with adequate medical care during the detention.

The applicant complained under Article 3, alleging that during his detention he had not received the medical treatment his doctor had prescribed and that the conditions of his detention there had been inhuman.

Following his release he had had to be admitted to a psychiatric hospital for treatment because of the deterioration in his state of health.

His statement was contested by the Russian government. The medical records of the applicant from the detention centre could not be referred to because they had been destroyed.

The Government based their statement on “*accounting and statistical records*” and reports and statements made by the detention facility staff from December 2010.

In determining the “*adequacy*” of the medical assistance, the Court considered that no convincing evidence had been submitted by the Government to demonstrate that the conditions at the temporary detention centre for juvenile offenders had been good and that adequate medical treatment had been provided. Unlike in national procedures, there are no procedural requirements for the admissibility of evidence before the Court. According to the Court’s case-law under Articles 2 and 3 of the Convention concerning persons in detention or custody, the burden of proof (within the meaning of “*a satisfactory and convincing explanation*”) lies with national authorities when they have exclusive knowledge (see § 140). According to those principles, the Court found that the Government had failed to demonstrate the adequacy of the treatment and concluded that there had been a violation of Article 3 of the Convention.

**Pending cases:**

\*\*\*[Soloveychik v. Ukraine](#), no. 25725/09, communicated on 13 December 2012;  
 \*\*\*[Sergeyeva and Proletarskaya v. Russia](#), no. 59705/12, communicated on 3 September 2013;  
 \*\*\*[Nicolshi v. the Republic of Moldova](#), no. 11726/09, communicated on 25 October 2013  
 \*\*\*[Kaimova and Others v. Russia and one other application v. Russia](#), nos. 24132/12 and 12617/14, communicated on 3 December 2014;  
 \*\*\*[Karakhanyan v. Russia](#), nos. 24421/11 and 55244/13, communicated on 15 December 2014;  
 \*\*\*[Burakova v. Ukraine](#), no. 14908/11, communicated on 22 January 2015;  
 \*\*\*[Goryayeva v. Ukraine](#), no. 58656/10, communicated on 12 April 2015;  
 \*\*\*[Khadzhyradovy v. Ukraine](#), no. 18320/09, communicated on 23 June 2016

LACK OF ADEQUATE MEDICAL ASSISTANCE OR TREATMENT IN DETENTION FACILITIES FOR PERSONS DIAGNOSED WITH HIV OR OTHER SERIOUS ILLNESSES

The cases concern the issue of lack of appropriate medical assistance or treatment for individuals who have been diagnosed with HIV or other serious illnesses and have nevertheless been detained (the case of

*Soloveychik v. Ukraine*, no. 25725/09), or for deceased persons who were held in penal facilities before their death (remaining cases).

The complaints under Articles 2 and 3 of the Convention are that the alleged lack of appropriate medical treatment in detention subjected the applicants or their relatives to unnecessary suffering and to inhuman or degrading treatment.

### ***H. Retention of fingerprints, cellular samples and/or DNA by authorities***

**[Van der Velden v.the Netherlands](#), no. 29514/05, decision of 7 December 2006**

**RETENTION OF CELLULAR MATERIAL FROM APPLICANT FOLLOWING CONVICTION: INADMISSIBLE**

In view of the applicant's conviction for extortion, and pursuant to section 8 in conjunction with section 2 § 1 of the DNA Testing (Convicted Persons) Act, on 8 March 2005 the public prosecutor ordered that cellular material be taken from the applicant – who was at that time detained in a penal institution in Dordrecht – in order for his DNA-profile to be determined. A mouth swab was taken from the applicant on 23 March 2005. The applicant lodged an objection against the decision to have his DNA profile determined and entered into the national DNA database. He submitted that his DNA profile had never played any role in the investigation of the offences of which he had been convicted. The Roermond Regional Court dismissed the objection on 21 April 2005. No appeal lay against this decision.

The applicant complained under Article 7 of the Convention that the order given by the public prosecutor, the taking of a sample of cellular material, and the storage of the DNA profile derived therefrom in the DNA database amounted to an additional penalty which it had not been possible to impose at the time he committed the offences of which he was convicted. He further complained that the impugned measure infringed Article 8 of the Convention in that it constituted an unjustified interference with his right to respect for his private life. Finally, the applicant argued that he had been the victim of discrimination as prohibited by Article 14 of the Convention.

The Court found the Article 7 complaint incompatible *ratione materiae*. As regards Article 8, the Court departed from the Commission's case-law, which had found that retention of DNA did not amount to an interference,

“... the Court nevertheless considers that, given the use to which cellular material in particular could conceivably be put in the future, the systematic retention of that material goes beyond the scope of neutral identifying features such as fingerprints, and is sufficiently intrusive to constitute an interference with the right to respect for private life set out in Article 8 § 1 of the Convention.”

The Court is satisfied that the impugned measure was ‘in accordance with the law’. The Court further has no difficulty in accepting that the compilation and retention of a DNA profile served the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. ‘The Court does not consider it unreasonable for the obligation to undergo DNA testing to be imposed on all persons who have been convicted of offences of a certain seriousness.

“Finally, the Court is of the view that the measures can be said to be ‘necessary in a democratic society’. In this context it notes in the first place that there can be no doubt about the substantial contribution which DNA records have made to law enforcement in recent years. Secondly, it is to be noted that while the interference at issue was relatively slight, the applicant may also reap a certain benefit from the inclusion of his DNA profile in the national database in that he may thereby be rapidly eliminated from the list of persons suspected of crimes in the investigation of which material containing DNA has been found.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.”

**S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, judgment of 4 December 2008**

**INDISCRIMINATE, “BLANKET” RETENTION OF FINGERPRINTS, CELLULAR SAMPLES AND DNA PROFILES FOLLOWING ACQUITTAL: VIOLATION OF ARTICLE 8**

The case concerned the retention by the authorities of the applicants’ fingerprints, cellular samples and DNA profiles after criminal proceedings against them were terminated by an acquittal in the case of S. and discontinued in the case of Marper. On 19 January 2001 S. was arrested and charged with attempted robbery. He was eleven years old at the time. His fingerprints and DNA samples were taken. He was acquitted on 14 June 2001. Mr Marper was arrested on 13 March 2001 and charged with harassment of his partner. His fingerprints and DNA samples were taken. On 14 June 2001 the case was formally discontinued as he and his partner had become reconciled.

Once the proceedings had been terminated, both applicants unsuccessfully requested that their fingerprints, DNA samples and profiles be destroyed. The information had been stored on the basis of a law authorising its retention without any time-limit.

The applicants complained under Articles 8 and 14 of the Convention about the retention by the authorities of their fingerprints, cellular samples and DNA profiles after their acquittal or discharge.

The Court found that the indiscriminate, “blanket” nature of the power of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences – as applied in the case of the present applicants – failed to strike a fair balance between the competing public and private interests, and that the respondent State had overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention in question constituted a disproportionate interference with the applicants’ right to respect for their private life and could not be regarded as

necessary in a democratic society. The Court concluded unanimously that there had been a violation of Article 8 in this case.

**W. v. the Netherlands, Application no. 20689/08, decision of 20 January 2009**

RETENTION OF CELLULAR MATERIAL FOLLOWING CONVICTION OF CRIMINAL OFFENCE:  
INADMISSIBLE

On 15 February 2007 the Juvenile Judge for criminal cases of the Maastricht Regional Court found the applicant guilty of causing bodily harm. The applicant was sentenced to a suspended term of juvenile detention, a community service order of 30 hours and a training order of 20 hours.

In view of the applicant's conviction, and pursuant to section 2 (1) of the DNA Testing (Convicted Persons) Act ("the Act") 7 June 2007, the public prosecutor ordered that cellular material be taken from the applicant in order for his DNA profile to be determined. A mouth swab was taken from the applicant on 18 July 2007.

On 31 July 2007 the applicant, pursuant to section 7 of the Act, lodged an objection against the decision to have his DNA profile determined and entered into a national DNA database. He submitted that, in accordance with Article 8 of the Convention and Article 40 of the Convention on the Rights of the Child of 20 November 1989, the personal interests of a minor should be balanced against the general interests of society when it was being considered whether to apply the Act to that minor, and within that balancing exercise the interests of the minor should be the primary consideration pursuant to Article 3 of the Convention on the Rights of the Child. The applicant submitted that consideration should be given to the age of the convicted person at the time of the commission of the crime, the seriousness of the offence, the circumstances under which the offence had been committed, the risk of the convicted person reoffending and other personal circumstances of the convicted person. On 2 November 2007 the Maastricht Regional Court, having heard the public prosecutor and counsel for the applicant in camera, dismissed the applicant's objection.

Declaring the application inadmissible, the Court found that, contrary to the *S. and Marper* case, cited above, the present case dealt with the issue of storing and retaining the DNA records of individuals who had been convicted of a criminal offence. Furthermore the Court considered that, pursuant to the provisions of the DNA Testing (Convicted Persons) Act, DNA material could only be taken from persons convicted of an offence of a certain gravity, and that the DNA records could only be retained for a prescribed period of time that was dependent on the length of the statutory maximum sentence that could be imposed for the offence that had been committed. The Court was therefore satisfied that the provisions of the Act

contained appropriate safeguards against the “*blanket*” and indiscriminate retention of DNA records.

Moreover, since the DNA material was stored anonymously and encoded, and the applicant would only be confronted with his stored DNA record if he had previously committed another criminal offence or committed one in the future, the Court saw no reason to diverge from its findings in *Van der Velden* on account of the mere fact that the applicant was a minor.

**\*\*[Deceuninck v. France](#), application no. 47447/08, decision of 13 December 2011**

INADMISSIBLE

The applicant complained that the order requiring DNA samples to be taken following his conviction for the destruction of genetically modified beetroot plants was a disproportionate interference with his right to respect for his private life. The application was declared inadmissible under Article 35 §§ 3(a) and 4 of the Convention for breach of confidentiality of friendly settlement details.

**\*\*\*[Barreau and Others v. France](#), no. 24697/09, decisions of 13 December 2011**

INADMISSIBLE

The applicants were convicted following their refusal to undergo testing for a national DNA database. The application was declared inadmissible under Articles 35 §§ 3(a) and 4 of the Convention for breach of confidentiality of friendly settlement details.

**\*\*[Gillberg v. Sweden](#) [GC], no. 41723/06, judgment of 3 April 2012**

PROFESSOR'S CRIMINAL CONVICTION FOR REFUSAL TO MAKE RESEARCH MATERIAL AVAILABLE: ARTICLES 8 AND 10 DO NOT APPLY

The applicant, a professor and Head of the Department of Child and Adolescent Psychiatry at the University of Gothenburg, was responsible for a long-term research project on hyperactivity and attention-deficit disorders in children. According to the applicant, the university's ethics committee had made it a precondition for the project that sensitive information about the participants would be accessible only to him and his staff, and he had therefore promised absolute confidentiality to the patients and their parents. In 2002, requests by a sociological researcher and a paediatrician to be granted access to the research material were refused. Both researchers appealed, and the Administrative Court of Appeal held that they should be granted access to the material. Although notified that the two researchers were entitled to immediate access by virtue of the judgments, the applicant refused to hand over the material. The university decided to refuse access to the sociological researcher and to impose a new condition on the

paediatrician, asking him to demonstrate that his duties required access to the research material in question. Those university decisions were annulled by the Administrative Court of Appeal. A few days later, colleagues of the applicant destroyed the research material. The Swedish Parliamentary Ombudsman brought criminal proceedings against the applicant. The applicant was convicted of misuse of office. As a result, he was given a suspended sentence and a fine of the equivalent of 4,000 euros. The university's vice chancellor and the officials who had destroyed the research material were also convicted. The applicant complained that his criminal conviction breached his rights under Articles 8 and 10 of the Convention.

In its Chamber judgment of 2 November 2010 the Court held that there had been no violation of Articles 8 and 10 of the Convention. On 11 April 2011 the case was referred to the Grand Chamber at the request of the applicant and a hearing was held on 28 September 2011.

The Court pointed out that the Grand Chamber had jurisdiction to examine only the part of the case that had been declared admissible by the Chamber judgment, namely the question of whether the applicant's criminal conviction infringed his rights under Articles 8 and 10 of the Convention, and observed that the applicant was not the children's doctor or psychiatrist, nor did he represent the children or their parents. The issue was whether his criminal conviction for misuse of office amounted to an interference with his "*private life*" under Article 8. The Court decided that the offence in question had no obvious bearing on his right to respect for private life, as it concerned professional acts and omissions by public officials in the exercise of their duties. The fact that the applicant might have lost income as a consequence of the criminal conviction, as he had argued, had been a foreseeable consequence of committing a criminal offence. In any event, he had not shown that there had been any causal link between his conviction and his dismissal by the Norwegian Institute of Public Health. Having stated that the repercussions of the conviction for the applicant's professional activities had exceeded the foreseeable consequences of the criminal offence for which he had been convicted, the Court concluded that Mr Gillberg's rights under Article 8 had not been affected.

The Court did not rule out that an independent "*negative*" right to freedom of expression, as relied on by the applicant, was protected under Article 10 of the Convention, despite the fact that the research was owned by the university. The Court found that the applicant's situation could not be compared to that of journalists protecting their sources or that of a lawyer bound by a duty *vis-à-vis* his clients. The Court found that the information disseminated by a journalist, based on his or her source, generally belonged to the journalist or the media, whereas in this case the research material was owned by the university and was thus in the public domain. It therefore concluded that the applicant's rights under Article 10 had not been affected.



**\*\*\*[M.K.v. France](#), no. 19522/09, judgment of 18 April 2013**

ABSENCE OF SAFEGUARDS FOR COLLECTION, PRESERVATION AND DELETION OF FINGERPRINT DATA OF PERSONS SUSPECTED BUT NOT CONVICTED OF CRIMINAL OFFENCES: VIOLATION OF ARTICLE 8

The applicant, who was suspected of book theft, complained about the retention of fingerprint data taken in the course of criminal proceedings in which he had been acquitted.

The Court reiterated its view that the retention of fingerprints enabling the identification of individuals interfered with the right to respect for private life under Article 8 of the Convention. It went on to assess the quality of French legal provisions (Article 55-1 of the Code of Criminal Procedure and Decree no. 87-249 of 8 April 1987 as amended) that allowed the retention of fingerprint data and found that the relevant provisions did not strike a fair balance between the competing public and private interests at issue.

While noting the legitimate aim of the database – the primary purpose of which was the detection and prevention of crime – the Court observed the lack of clear rules concerning the secondary purpose of facilitating the prosecution, investigation and trial of cases before the judicial authorities. This purpose did not differentiate between offences or crimes, or even serious and minor offences, and no distinction was made between convicted, suspected, and prosecuted persons. The Court emphasised the risk of stigmatising innocent individuals.

While taking into account the possibility that the data could be deleted, the Court noted that it was retained for a period of twenty-five years, which in practice amounted to indefinite retention. The Court found that the interference with the right to respect for private life under Article 8 was disproportionate and not necessary in a democratic society.

**\*\*\*[Peruzzo and Martens v. Germany](#), nos. 7841/08 and 57900/12, decision of 4 June 2013**

COLLECTION AND RETENTION OF DNA PROFILES OF CONVICTED INDIVIDUALS FOR POSSIBLE USE IN FUTURE: INADMISSIBLE

The German Code of Criminal Procedure concerning DNA analysis provides for the collection of cell tissue, which is subjected to molecular and genetic examination for the purposes of establishing the DNA profile of suspected and/or convicted persons subject to conditions set out in Article 81(g). The DNA profiles extracted from the cellular samples are kept in the Federal Criminal Police Office's database for a maximum of ten years.

The first applicant had been convicted of several drug-related offences, the second applicant of violent offences.

Both applicants complained under Article 8 of the Convention of a violation of their right to informational privacy (*informationelles*



*Selbstbestimmungsrecht*). They alleged that the law was unclear, since the wording of Article 81(g) left substantial room for interpretation.

The Court, confirming the collection and retention of DNA to be an interference with the right to respect for private life guaranteed by Article 8, pointed out that the legitimate aim thereof was the prevention of crime and the protection of the rights and freedoms of others. It held that this interference had been necessary in a democratic society and underlined the wide margin of appreciation of the national authorities in their assessment.

The Court noted that the safeguards provided for by the law in question were appropriate: only DNA material from frequent criminal offenders or from individuals suspected of a criminal offence of substantial significance or of a crime against sexual self-determination, was to be retained.

Furthermore, taking into account that the retained DNA profiles could only be disclosed to the relevant authorities for the purposes of criminal proceedings, the avoidance of risk (*Gefahrenabwehr*), or international legal assistance, the Court was satisfied with the procedural guarantees and rejected the complaint as manifestly ill-founded.

**\*\*\*[Elberte v. Latvia](#), no. 61243/08, judgment of 13 January 2015, ECHR 2015**

REMOVAL OF BODY TISSUE FROM THE APPLICANT'S DECEASED HUSBAND BY FORENSIC EXPERTS AFTER HIS DEATH WITHOUT HER KNOWLEDGE OR CONSENT: VIOLATION OF ARTICLES 3 AND 8

The applicant's husband died in a car accident in 2001. His body was delivered to a forensic centre for an autopsy. The applicant first saw her deceased husband's body, with the legs tied together, when his corpse was handed over for burial.

Two years later, the Security Police informed the applicant that a criminal inquiry had been opened into the illegal removal of organs and tissue between 1994 and 2003 in Latvia. Pursuant to a State-approved agreement, tissue had been removed from her husband's body after the autopsy and sent to a pharmaceutical company in Germany for the creation of bio-implants. The procedure had been carried out by the experts at the forensic centre under the agreement. The domestic law at the relevant time provided for the possibility of the removal of organs and tissues from a deceased person if the deceased person had not expressed his or her refusal to donate them during his or her lifetime and no objections had been received from the closest relatives. However, the domestic authorities had taken the view that the law did not impose on them an obligation to require the consent of the closest relatives. Therefore, the experts were not found guilty of breaching the law.

The applicant complained of a breach of her right to respect for her private and family life under Article 8 on account of the removal of body tissue from her deceased husband by forensic experts after his death without

her knowledge or consent. Relying on Article 3, the applicant also claimed that she had suffered emotionally, as she had not been aware of the tissue removal but had seen the body of her husband with his legs tied together.

The Court held that there had been a violation of the applicant's right to respect for her private life under Article 8, since she had not been informed about the removal of her husband's tissue when it was carried out. The Court further held that the relevant law lacked sufficient clarity: the applicant had a right to express consent or refusal, but the corresponding obligation on the domestic authorities to request it was not clearly established.

As to a violation of Article 3, the Court disagreed with the Government's view that the suffering of the applicant had not reached the level of severity required under Article 3. She had suffered a long period of uncertainty, anguish and distress through not knowing what had been done in the forensic centre.

**Pending cases:**

\*\*\*[Djalo v. the United Kingdom](#), no. 17770/10, communicated on 10 December 2014

\*\*\*[Hall v. the United Kingdom](#), no. 21457/11, communicated on 10 December 2014

\*\*\*[Gare-Simmons v. the United Kingdom](#), no. 71358/12, communicated on 10 December 2014

\*\*\*[Murphy v. the United Kingdom](#), no. 51594/10, communicated on 10 December 2014

WHETHER THE RETENTION OF THE APPLICANT'S FINGERPRINTS, CELLULAR SAMPLES AND/OR DNA DATA WAS IN BREACH OF ARTICLE 8 OF THE CONVENTION

All cases refer to the relevant domestic law and practice at the time the applicants' data was taken, as set out in the judgment of 4 December 2008 in the case of *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/044, cited above.

**I. Right to know one's biological identity**

[Odièvre v. France](#) [GC], no. 42326/98, judgment of 13 February 2003

RULES GOVERNING CONFIDENTIALITY CONCERNING BIRTH PREVENTED APPLICANT FROM OBTAINING INFORMATION ABOUT HER NATURAL FAMILY: NO VIOLATION OF ARTICLE 8

"24. The applicant complained that she was unable to obtain identifying information about her natural family and had thereby been prevented from finding out her personal history.

29. The Court reiterates in that connection that 'Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. ... The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life' (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47,

ECHR 2001-I). Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see *Mikulić v. Croatia*, no. 53176/99, §§ 54 and 64, ECHR 2002-I). Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. That provision is therefore applicable in the instant case.

(...)

48. The Court observes that in the present case the applicant was given access to non-identifying information about her mother and natural family that enabled her to trace some of her roots, while ensuring the protection of third-party interests.

49. In addition, while preserving the principle that mothers may give birth anonymously, the system recently set up in France improves the prospect of their agreeing to waive confidentiality, something which, it will be noted in passing, they have always been able to do even before the enactment of the law of 22 January 2002. The new legislation will facilitate searches for information about a person's biological origins, as a National Council for Access to Information about Personal Origins has been set up. That council is an independent body composed of members of the national legal service, representatives of associations having an interest in the subject matter of the law and professional people with good practical knowledge of the issues. The legislation is already in force and the applicant may use it to request disclosure of her mother's identity, subject to the latter's consent being obtained to ensure that her need for protection and the applicant's legitimate request are fairly reconciled. Indeed, though unlikely, the possibility that the applicant will be able to obtain the information she is seeking through the new Council that has been set up by the legislature cannot be excluded.

French legislation thus seeks to strike a balance and to ensure sufficient proportion between the competing interests. The Court observes in that connection that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests. Overall, the Court considers that France has not overstepped the margin of appreciation which it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Consequently, there has been no violation of Article 8 of the Convention.”

**Jäggi v. Switzerland, no. 58757/00, judgment of 3 July 2003**

**REFUSAL OF AUTHORITIES TO ANALYSE DNA OF ALLEGED FATHER (DECEASED): VIOLATION OF ARTICLE 8 AND OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8**

The applicant complained that he had been unable to have a DNA test carried out on a deceased person in order to ascertain whether the person was his biological father. He alleged that he had suffered a violation of his rights under Article 8 of the Convention.

“34. The Court observes that in the instant case the Swiss authorities refused to sanction a DNA test which would have allowed the applicant to know for certain that A.H., his putative father, was indeed his biological father. That refusal affected the applicant's private life.

(...)

36. The Court reiterates that the choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring respect for private life, and the nature of the State's obligation will depend on the particular aspect of private life that is in issue (see *Odièvre*, cited above, § 46).

37. The extent of the State's margin of appreciation depends not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned. The Court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests.

38. The Court considers that persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. At the same time, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing (see *Mikulić*, cited above, § 64). The Court must examine whether a fair balance was struck between the competing interests in this case.

39. In weighing up the different interests at stake, consideration should be given, on the one hand, to the applicant's right to establish his parentage and, on the other hand, to the right of third parties to the inviolability of the deceased's body, the right to respect for the dead, and the public interest in preserving legal certainty.

(...)

44. It follows that, having regard to the circumstances of the case and the overriding interest at stake for the applicant, the Swiss authorities did not guarantee him the respect for his private life to which he is entitled under the Convention.

There has therefore been a violation of Article 8 of the Convention.”

***Phinikaridou v. Cyprus, Application no. 23890/02, judgment of 20 December 2007***

**PROCEEDINGS INSTITUTED FOR JUDICIAL RECOGNITION OF PATERNITY HELD TO BE TIME-BARRED UNDER THE APPLICABLE LAW: VIOLATION OF ARTICLE 8**

“44. In this connection the Court notes that the applicant, a child born out of wedlock, sought by means of judicial proceedings to determine her legal relationship with the person she claimed was her father through the establishment of the biological truth.

45. The Court reiterates that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention (see *Odièvre v. France* [GC], no. 42326/98, § 29, ECHR 2003-III). Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see, for example, *Mikulić v. Croatia*, no. 53176/99, §§ 53-54, ECHR 2002-I, and *Gaskin v. the United Kingdom*, judgment

of 7 July 1989, Series A no. 160, p. 16, §§ 36-37, 39). This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see *Jäggi v. Switzerland*, no. 58757/00, § 25, ECHR 2006-X; *Odièvre*, § 29; and *Mikulić*, §§ 54 and 64; both cited above).

46. Accordingly, the facts of the case fall within the ambit of Article 8 of the Convention.

(...)

65. Hence, even having regard to the margin of appreciation left to the State, the Court considers that the application of a rigid time-limit for the exercise of paternity proceedings, regardless of the circumstances of an individual case and, in particular, the knowledge of the facts concerning paternity, impairs the very essence of the right to respect for one's private life under Article 8 of the Convention.

66. In view of the above, and in particular having regard to the absolute nature of the limitation period, the Court considers that a fair balance has not been struck between the different interests involved and, therefore, that the interference with the applicant's right to respect for her private life was not proportionate to the legitimate aims pursued.

67. Accordingly, the Court finds that there has been a violation of Article 8."

**\*\**Darmon v. Poland*, no. 7802/05, decision of 17 November 2009**  
ACCESS TO DNA TEST AFTER EXPIRY OF TIME-LIMIT: INADMISSIBLE

The applicant was married in 1972 and in 1973 his wife gave birth to a daughter. In 1984 the couple divorced. No doubts as to the applicant's paternity were raised in the divorce proceedings. In 2003, after DNA evidence had become available in Poland, the applicant decided to bring an action denying paternity, but his daughter refused to undergo the test. After the Polish authorities' refusal to grant the applicant's request, he complained to the Court under Articles 6 and 8 of the Convention.

The Court has previously stated that under the relevant domestic provisions, a husband could repudiate a child conceived in wedlock by bringing relevant civil proceedings within six months of learning of the birth of the child. Accepting that, under certain circumstances, the introduction of time-limits for paternity proceedings may serve the interests of legal certainty and the interests of the children (see *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A no. 87, p. 15, § 41), the Court considered that the applicant's request to bring such an action on his behalf was unjustified as he could not provide any evidence substantiating doubts as to his paternity. The applicant's former wife confirmed his paternity and refused to undergo a DNA test. The Court noted that, although the applicant's daughter was over thirty years old, she apparently considered the applicant as her father and refused to undergo genetic tests. In the light of all the material in its possession, the Court found that the application did not disclose any appearance of a violation of Articles 6 or 8 of the Convention and rejected it as manifestly ill-founded.

**\*\*[Klocek v. Poland](#), no. 20674/07, decision of 27 April 2010**

REFUSAL OF THE AUTHORITIES TO PROVIDE DNA TESTING: INADMISSIBLE

The applicant had sexual contact with a woman who gave birth to a child in August 1982. A blood-group test conducted in 1984 established that the features of the applicant's and the woman's blood were identical and it was therefore not possible either to exclude the paternity of the applicant or to confirm it. The applicant was declared the father of the child by the Krakow District Court in 1986. The applicant complied with the court's decision and the maintenance order until 2005, when he sought to contest his paternity, relying on the fact that it had been determined in 1986 on the basis of expert evidence corresponding to the state of science at that time and that new methods of establishing paternity, such as DNA testing, allowed for its precise determination. The Krakow District Court dismissed the applicant's claim on the grounds that his case was *res iudicata*. The Krakow Regional Court upheld the first-instance judgment and its reasoning. The Supreme Court refused to entertain a cassation appeal lodged by the applicant. The applicant complained to the Court under Article 8 and Article 14 read in conjunction with Article 8 of the Convention.

Holding the opinion that "*with the passage of time, the rule of legal certainty gradually prevails over the need to protect the interest of concerned parties, especially children who are no longer minors*", the Court noted that the applicant's paternity was determined judicially on the basis of the evidence which was available at the relevant time and underlined that the applicant had not appealed against the domestic court's decision establishing his paternity and that for many years he had complied with the court's order. The pre-requisites for re-opening had not been fulfilled and, moreover, the applicant did not have legal standing to bring an action to challenge his paternity. The applicant had no new evidence except for the results of a DNA test which could prove his allegations. Taking into consideration all the above circumstances, the Court concluded the application to be manifestly ill-founded as a whole and therefore declared it inadmissible.

**\*\*[Gronmark v. Finland](#), no. 17038/04, judgment of 6 July 2010**

TIME-LIMIT FOR JUDICIAL RECOGNITION OF PATERNITY SHOULD NOT BE IMPOSED AUTOMATICALLY: VIOLATION OF ARTICLE 8

The applicant, who was born out of wedlock, found out that the paternity of her father, R.J., had never been legally recognised. Because he had paid child support until the applicant had reached majority, she and her mother had been under the impression that paternity had been established when the courts ordered him to pay. In the civil proceedings which the applicant brought against her half-sister to have R.J.'s paternity confirmed, the district court ordered DNA tests, which established with 99.8% certainty that R.J. was the applicant's father. The Finnish 1976 Paternity Act required that



paternity proceedings concerning a child born before the Act came into force would have had to be started within five years, that is to say before October 1981, and no claim could be examined after the death of the father. For that reason the court dismissed the applicant's claim because she had brought it after the expiry of the time-limit. The Supreme Court eventually upheld that decision in November 2003. The applicant complained that the time-limit for establishing the paternity of children born before the entry into force of the Paternity Act gave rise to a violation of her rights, in particular under Article 8 of the Convention, as she could not have her father's paternity legally confirmed, despite conclusive DNA tests.

The Court observed that there was no uniform approach to judicial recognition of paternity in European States, but there was a tendency towards a greater protection of the right of the child to have her or his paternal affiliation established. Once the applicant had become an adult, the limitation period for bringing paternity proceedings had already elapsed. She was thus unable to have the legal status of her biological father established, even though she had not had any realistic opportunity to go to court during the relevant period. The Court found it difficult to accept that the national authorities had allowed the legal constraints to override biological facts by relying on the absolute nature of the time-limit even though the applicant had put forward conclusive evidence through DNA tests. The Court found that such a radical restriction of the right to institute proceedings for the judicial determination of paternity was not proportionate to the aim of ensuring legal certainty and that applying a rigid time-limit for the exercise of paternity proceedings, regardless of the circumstances of an individual case impaired the very essence of the right to respect for one's private life. It therefore held that there had been a violation of Article 8 of the Convention.

**\*\*[Backlund v. Finland](#), no. 36498/05, judgment of 6 July 2010**

TIME-LIMIT FOR JUDICIAL RECOGNITION OF PATERNITY SHOULD NOT BE IMPOSED AUTOMATICALLY: VIOLATION OF ARTICLE 8

This case also deals with the Finnish 1976 Paternity Act (see *Gronmark v. Finland*, cited above). The applicant, who was born out of wedlock, applied to the district court to establish the paternity of N.S., the man he and his mother had always considered to be his father and who had been placed under guardianship in 2000. DNA tests ordered by the court established with 99.4% certainty that N.S. was the applicant's biological father. The court ruled that his claim was time-barred. The applicant appealed, claiming in particular that a court decision would be the only way to have the paternity of his biological father legally recognised because, given his state of health, N.S. could no longer make a legally valid acknowledgement of his paternity. The appeal was dismissed and the Supreme Court subsequently refused leave to appeal. The applicant complained that the

time-limit for establishing the paternity of children born before the entry into force of the Paternity Act gave rise to a violation of his rights, in particular under Article 8, as he could not have his father's paternity legally confirmed, despite conclusive DNA tests.

The Court stated that, while the Finnish Paternity Act adequately secured the interests of people born out of wedlock who had been acknowledged by their fathers and those of people born after the Act's entry into force, as well as those born earlier who had been able to initiate paternity proceedings within the time-limit, it did not make any allowance for people in the applicant's situation. It could accept that the applicant, as an adult, should have brought those proceedings during the limitation period. However, the Court had difficulties in accepting the inflexible limitation period, with time running irrespective of a child's ability to provide reliable evidence. The Court considered that such a radical restriction of the right to institute proceedings for the judicial determination of paternity was not proportionate to the aim of ensuring legal certainty and that applying a rigid time-limit for the exercise of paternity proceedings, regardless of the circumstances of an individual case impaired the very essence of the right to respect for one's private life. It therefore held that there had been a violation of Article 8 of the Convention.

**\*\*[\*Chavdarov v. Bulgaria\*](#), no. 3465/03, judgment of 21 December 2010**

LEGAL IMPOSSIBILITY OF RECOGNITION OF BIOLOGICAL PATERNITY: NO VIOLATION OF ARTICLE 8

The applicant set up home with a married woman, who was living separately from her husband, in 1989. The woman gave birth to three children, in 1990, 1995 and 1998, while they were living together. The woman's husband was named as the children's father on their birth certificates and the children were given his surname. At the end of 2002 the woman left the applicant and the children in order to set up home with another partner. Since then the applicant has lived with the three children. At the beginning of 2003 he consulted a lawyer with a view to bringing proceedings for recognition of paternity. However, the lawyer informed him that there were no provisions under Bulgarian law for this purpose. As a result, the applicant applied directly to the Court a few days later, relying on Article 8 of the Convention and complaining of his inability to be recognised as the legal father of the three children of whom he claimed to be the biological father.

The Court noted that Bulgaria had an obligation to secure effective enjoyment of the right to respect for "*family life*" where it existed and shared the opinion that the ties between the applicant and the three children, whose biological father he claimed to be, did indeed amount to "*family life*" within the meaning of the Convention. The Court also took into consideration the margin of appreciation enjoyed by the State in regulating



paternal filiation, and noted that there was no Europe-wide consensus on whether domestic legislation should enable the biological father to contest the presumption of a husband's paternity. While emphasising that, although the applicant was unable to bring an action to challenge the three children's paternal filiation, domestic legislation did not deprive him of the possibility of establishing a paternal link in their regard or of overcoming the practical disadvantages posed by the absence of such a link, the Court noted that the State authorities could not be held responsible for the applicant's own passivity. The Court concluded that there had not been a violation of Article 8.

**\*\**Krušković v. Croatia*, no. 46185/08, judgment of 21 June 2011**

THE FIRST CASE CONCERNING RECOGNITION OF PATERNITY OF A FATHER WHO HAD LOST LEGAL CAPACITY: VIOLATION OF ARTICLE 8

The applicant was deprived of legal capacity in February 2003 after suffering from personality disorders following long-term drug abuse. His mother was appointed first as his legal guardian, then in September 2006 his father and, after that, an employee of the Opatija Social Welfare Centre. In August 2007 the applicant stated that he was the father of a baby girl, born in June the same year. He did this with the mother's consent and was subsequently registered as the child's father on her birth certificate. After being informed that the applicant no longer had legal capacity, in October 2007 the domestic courts ordered that the child's birth certificate be amended. The applicant complained under Article 8 of the Convention about being denied the right to be registered as the father of his biological child, born out of wedlock.

The Court has noted that the relevant authorities at no time invited the applicant's legal guardian to consent to the recognition of his paternity, nor did the welfare centre take any steps to assist him in his attempts to have his paternity recognised. The Court recognised that in the two and a half years between the date when the applicant made his statement to the registry and the launching of the proceedings before the national courts to establish paternity, he had been left in a legal void, with his claim being ignored for no apparent reason. It decided that this was not in the best interests of either the father – who had a vital interest in establishing the biological truth about an important aspect of his private life – or of the child, who wished to be informed about her personal identity. Reiterating that “*a child born out of wedlock also has a vital interest in receiving the information necessary to uncover the truth about an important aspect of their personal identity, that is, the identity of their biological parents*” (§ 41), the Court held that there had been a violation of Article 8.

**\*\**Schneider v. Germany*, no. 17080/07, judgment of 15 September 2011**

APPLICANT'S ACCESS TO A BOY HE CLAIMS IS HIS BIOLOGICAL SON AND WHOSE LEGAL FATHER IS THE MOTHER'S HUSBAND: VIOLATION OF ARTICLE 8

The applicant had a relationship with a married woman between May 2002 and September 2003 and claimed to be the biological father of her son, born in March 2004, whose legal father is the mother's husband. In the interest of their family, the married couple preferred not to establish the child's paternity. During the pregnancy, the applicant accompanied the woman to at least two medical consultations and acknowledged paternity of the child before the Youth Office. He applied to the Fulda District Court, requesting access to the child twice a month and regular information about his development. The court dismissed the request in October 2005, finding that the applicant, even assuming that he was the boy's biological father, did not fall within the group of people who had a right of access under the relevant provisions of the German Civil Code. In particular, he was not the boy's legal father; his acknowledgement of paternity was not valid; he had no right to contest the legal father's paternity as there was a social and family relationship between the legal father and the boy; and the applicant did not have close ties with the boy, as he had never lived with him. The applicant complained under Article 8 of the Convention that the German courts had refused to grant him access to the boy or information about his personal circumstances, and that the courts had failed to investigate sufficiently the relevant facts concerning his relationship with his son, in particular his paternity and the question of whether access was in the child's best interest. He further complained that the court decisions discriminated against him, relying on Article 8 in conjunction with Article 14 (prohibition of discrimination) of the Convention.

The Court noted that although the applicant and the child's mother had never lived together, it was undisputed that they had had a relationship which lasted for a year and four months, and was thus not merely casual. The applicant had shown sufficient interest in the child, having planned to have the child with the mother, having accompanied her to medical examinations and having acknowledged paternity even before the child's birth. The Court therefore did not rule out that the applicant's intended relationship with the boy could fall within the ambit of "*family life*" under Article 8. The Court found that it had not been established whether or not he was the biological father of the boy, and that the German courts had not undertaken a fair balancing of the rights of all persons involved. It therefore held that there had been a violation of Article 8 of the Convention. The Court did not consider it necessary to determine whether the domestic courts' decisions had thereby discriminated against the applicant in breach of Article 8 read in conjunction with Article 14.

**\*\*\*[A.M.M. v. Romania](#), no. 2151/10, judgment of 14 February 2012**  
**SHORTCOMINGS IN THE CONDUCT OF PROCEEDINGS TO ESTABLISH THE PATERNITY OF A MINOR WITH DISABILITIES: VIOLATION OF ARTICLE 8**

The applicant is a disabled child. His representation before the Court was secured by his maternal grandmother, since the applicant's mother also suffers from a serious disability and was unable to represent him.

The applicant was born out of wedlock in 2001. His birth certificate stated that he had a father of unknown identity. His mother tried to establish the paternity of the applicant immediately, in 2001, by claiming that Z. was the father. Z. made a written statement that he recognised his paternity, but that statement was found to be inadmissible by the domestic court of first instance. After a second appeal by the applicant's mother, the case was referred back to the court of first instance. Despite a court order, Z., the alleged father, did not appear for a forensic test. Neither the applicant nor his mother was represented by a lawyer during the proceedings. The guardianship office and the public prosecutor did not participate in the hearings. Two witnesses failed to appear at the hearings.

The Court held that there had been a violation of Article 8 in respect of the conduct of the proceedings and the legal framework.

It noted the failure of the domestic courts to ensure the proper representation of the child's interests and those of his mother, both of whom belonged to a vulnerable group of persons with disabilities. It noted the lack of any action on the part of the courts to ensure the participation in the proceedings of either guardianship office or the public prosecutor. No further steps had been taken to contact the missing witnesses. In addition, national law did not provide for procedural safeguards enabling the courts to force the alleged father to undergo a DNA test.

**\*\*[Kautzor v. Germany](#), no. 23338/09, judgment of 22 March 2012**  
**REFUSAL TO ALLOW A PRESUMED FATHER TO CHALLENGE ANOTHER MAN'S PATERNITY: NO VIOLATION OF ARTICLES 8 AND 14**

The applicant assumed that he was the biological father of his former wife's daughter, born in March 2005. His former wife was living with a new partner, who acknowledged paternity of her daughter in May 2006. The couple subsequently had two more children together and got married. The applicant indicated to his former wife that he wished to have access to the child and to acknowledge paternity. The applicant lodged an action to have his paternity established, but his request was refused because a social and family relationship existed between the child and her legal father and, since the child already had a legal father, the applicant did not have the right to have his paternity established by a genetic test. The applicant complained, under Article 8 alone and in conjunction with Article 14 of the Convention, about the German courts' refusal to allow him to challenge another man's paternity and alleged that he had been discriminated against.

The Court found that the German courts' decision to reject the applicant's request to legally establish paternity of his presumed biological child interfered with his right to respect for his *private life* under Article 8. At the same time, the Court found that this decision did not amount to an interference with his *family life* for the purpose of Article 8, as there had never been a close personal relationship between the applicant and the respective children. The Court noted that it could be deduced from the judgment in *Anayo v. Germany*, no. 20578/07, judgment of 21 December 2010) that, under Article 8, States had an obligation to examine whether it was in the child's best interests to allow the biological father to establish a relationship with his child, for example by granting contact rights. However, this did not necessarily imply a duty under the Convention to allow the biological father to challenge the legal father's status. The Court observed that none of the twenty-six Member States it had examined provided a procedure to establish biological paternity without formally challenging the recognised father's paternity. There had accordingly been no violation of Article 8. The main reason why the applicant had been treated differently from the mother, the legal father and the child was to protect the respective child and her social family from external disturbances. There had accordingly been no violation of Article 8 in conjunction with Article 14.

**\*\*[Ahrens v. Germany](#), no. 45071/09, judgment of 22 March 2012**

REFUSAL TO ALLOW A PRESUMED FATHER TO CHALLENGE ANOTHER MAN'S PATERNITY: NO VIOLATION OF ARTICLE 8

The case is similar to *Kautzor v. Germany*, cited above.

The applicant assumed that he was the biological father of a girl born in August 2005, with whose mother he had had a relationship. At the time of conception, the girl's mother was living with another man, who acknowledged paternity of the child. In October 2005, Mr Ahrens lodged an action to challenge the legal father's paternity. The legal father submitted in reply that he assumed full parental responsibility for the child, even though he was not her biological father. The District Court, having questioned the parties and considered an expert report and the result of a blood test of the two men, established that the applicant was the child's biological father and held that he was not precluded from challenging the legal father's paternity. The Court of Appeal quashed the judgment, holding that he did not have the right to challenge paternity because of the social and family relationship between the legal father and the child. The Federal Constitutional Court rejected the applicant's constitutional complaint. Relying on Article 8 alone and also in conjunction with Article 14 of the Convention, the applicants complained about the German courts' refusal to allow him to challenge another man's paternity and alleged that he had been discriminated against in comparison with the mother, the legal father and the child.

The Court found that the German courts' decision to reject the applicant's request to legally establish paternity of his biological child interfered with his right to respect for his *private life* under Article 8 of the Convention. At the same time, the Court found that these decisions did not amount to an interference with his family life for the purpose of Article 8 of the Convention, as there had never been a close personal relationship between the applicant and the child. The Court noted that, according to its comparative research, a majority of Council of Europe Member States allowed a presumed biological father to challenge the legal paternity of another man established by acknowledgment, even where the legal father was living with the child in a social and family relationship. However, in a significant minority of nine Member States, the presumed biological father did not have the standing to contest the paternity of the legal father. There was accordingly no settled consensus and the States thus enjoyed a wide margin of appreciation as regards the rules on determination of a child's legal status (see *Ahrenz v. Germany*, no. 45071/09, §§ 37-39). While it was in the applicant's interest to establish an important aspect of his private life and have it legally recognised, the German courts' decisions had aimed to comply with the legislature's will to give precedence to an existing family relationship between the child and her legal father, who provided parental care on a daily basis. The Court decided that the German courts had examined the respective situation with due diligence. There had accordingly been no violation of Article 8.

**\*\*\*[Carmel Cutajar v. Malta](#), no. 55775/13, decision of 23 June 2015**

**DISAVOWAL OF THE APPLICANT'S PATERNITY OF X. REJECTED BY THE NATIONAL COURTS:  
INADMISSIBLE**

The applicant's wife gave birth to X. in 1976 during their marriage. After separating from his wife, the applicant was diagnosed in 1987 with Sertoli Cell Only Syndrome, a disorder characterised by male sterility.

The applicant instituted civil proceedings seeking the disavowal of his paternity of X. The court ordered that different expert scientific tests be undertaken to verify the applicant's parentage. The DNA test showed that the applicant and X. had twenty-one common genetic markers indicating the paternity of the applicant. However, the applicant alleged that X. could be the son of his own father. The civil court, after hearing evidence from various witnesses, dismissed the applicant's claim. After examining additional medical opinions, the Court of Appeal upheld the lower court's decision on the grounds that the applicant could not prove that he could never have had children. The applicant's requests for a retrial were unsuccessful, as were his applications for constitutional redress proceedings. His request for a new DNA order was also rejected.

Before the Court, the applicant complained under Article 6 that his right to a fair trial had been breached, since the evidence had been wrongly

assessed by the domestic courts. Furthermore, the refusal of a new DNA test had violated his right to determine X's paternity under Article 8 of the Convention.

The Court noted its subsidiary role within regular paternity proceedings and limited itself to reviewing the national courts' decisions, bearing in mind the margin of appreciation afforded to a member State.

It underlined the discretion of the national courts in assessing the evidence, and therefore rejected the violation of Article 6 of the Convention.

The Court found that the refusal of a new DNA test had not violated the applicant's rights under Article 8, since in the present case a DNA test had already been conducted and its results admitted to the proceedings. The domestic courts had based their judgments on the entire body of evidence admitted and reviewed during the proceedings, which had taken place with the active participation of the applicant.

The Court held that the Constitutional Court had struck a proper balance between the applicant's right to know the paternity of X., the interests of X. in having a legal father, and the interests of the mother in clearing her reputation. Referring to its own case-law, the Court found that the interests of the child and his family prevailed over the interests of the applicant in knowing the biological paternity of X.

**\*\*\*[Mandet v. France](#), no. 30955/12, judgment of 14 January 2016**

ANNULMENT OF RECOGNITION OF PATERNITY AND LEGITIMISATION OF THE CHILD AT THE REQUEST OF THE ALLEGED BIOLOGICAL FATHER: NO VIOLATION OF ARTICLE 8

The first and second applicants were married for the first time in 1986. The third applicant was born after their divorce, in 1996. The following year, the child was recognised by the second applicant. The first and second applicants remarried in 2003.

In 2005, the paternity was challenged by Mr Glouzmann, who claimed to be the biological father of the third applicant.

The applicants moved to Dubai after the start of the proceedings, meaning that a DNA test could not be conducted. Nevertheless, the domestic court observed that the child had been born more than 300 days after the first and second applicants' separation. It regarded the refusal of the couple to take the child for a DNA test as an indication of their uncertainty concerning the second applicant's established paternity. The domestic court was convinced, after it had taken evidence from witnesses, that the first applicant and Mr Glouzmann had been having an intimate relationship at the time of the conception of the child and after the birth, and that the child had been known as their joint child. Therefore the court, contrary to the expressed will of the child, annulled the first applicant's recognition of paternity, changed the child's name to the mother's surname and named Mr Glouzmann as the father. Mr Glouzmann was awarded



contact rights but the parental authority stayed exclusively with Mrs Mandet.

The applicants complained of interference with their family life under Article 8 of the Convention and referred to the disproportionality of the measures in view of the prevailing interests of the child in living in an established child-parent relationship.

The Court confirmed that there had been interference in the private and family life of the third applicant and declared the applications of the first and second applicants inadmissible for non-exhaustion of domestic remedies. It considered that the crucial aspect of family life and the question of paternity concerned “*biological truth*”, and noted that the measures in question had been aimed at protecting the interests of the other person, namely Mr Glouzmann.

Since the case concerned the determination of a child’s legal status (and did not refer directly to contact and information rights), the Court considered that a wide margin of appreciation had to be given to the member State. The expressed wish of a child did not necessarily coincide with its best interests. It was noteworthy that the decisions in question had not prevented the third applicant from living with the Mandet family. His mother exercised parental authority.

It appeared to the Court that the domestic courts had not failed to attach decisive importance to the child’s best interests, but instead had held that those interests did not necessarily lie where the child perceived them – that is to say in maintaining the parent-child relationship as established and in preserving emotional stability – but rather in ascertaining his real paternity. In their decisions the courts did not unduly favour Mr Glouzmann’s interests over those of the child, but held that their interests partly coincided. By acting in this way, the domestic courts had not overstepped the discretion (“*the margin of appreciation*”) allowed them.

\*\*\**Canonne v. France*, no. 22037/13, decision of 2 June 2015

DOMESTIC COURT’S DECISION ON PATERNITY BASED ON APPLICANT’S REFUSAL TO UNDERGO GENETIC TESTING: INADMISSIBLE

A lawsuit had been brought against the applicant before the Paris *Tribunal de Grande Instance* to determine the parent-child relationship. Paternity of the child concerned, Eléonore P., had already been attributed to another man, so the proceedings were aimed at the annulment of the previous paternity declaration and the judicial declaration of the paternity of the applicant.

The Paris court ordered genetic tests in respect of the previously acknowledged father of the child and the applicant. The tests established that the previously recognised “*father*” was not the biological father.

The applicant refused to undergo a genetic test and failed to appear before the expert. The Paris court therefore found the applicant to be the

father of Eléonore P. and ordered a marginal note be entered on the birth certificate to that effect. An appeal lodged by the applicant against this decision was unsuccessful.

The applicant complained under Articles 6 and 8 of the Convention. In particular, he complained about the unfairness of the preliminary admissibility procedure for cassation appeals. He also stated that the domestic court had not declared some of the evidence submitted by the other party to be inadmissible. As to Article 8, he argued that the obligation created by the courts for respondents in paternity proceedings to undergo a DNA test breached the principle of the inviolability of the human body. The Court rejected the complaints as manifestly ill-founded and declared the application to be inadmissible.

Relying on its previous case-law, the Court reiterated that the French appeal procedure was in accordance with the principles set out in Article 6 § 1 of the Convention. It also noted that in the case in question, the applicant had been given access to the court file. The Court reiterated its subsidiarity rule in respect of the assessment of evidence and reaffirmed the primary position of the national court in this respect.

Under Article 8, the Court found the interference with the applicant's right to respect for his private life to be lawful. Noting the member States' wide margin of appreciation concerning this issue, the Court found that an appropriate balance had been struck between the competing interests of the applicant's right and the (prevailing) right of the child – who was now an adult – to know his or her parentage (as a part of the child's right to respect for its private life).

It also noted that, when deciding the case, the domestic court did not rely solely on the applicant's refusal to undergo a DNA test but also took into account the other evidence submitted by both parties to the proceedings.



## II EXAMPLES OF CASES WHERE THE OVIEDO CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE OF 4 APRIL 1997 OR THE WORK OF THE COUNCIL OF EUROPE IN THIS AREA HAVE BEEN CITED

### A. References to the Oviedo Convention on Human Rights and Biomedicine of 4 April 1997

- [Cyprus v. Turkey](#), no. 25781/94, judgment of 10 May 2001, (partly dissenting opinion of Judge Marcus-Helmond);<sup>4</sup>
- [Glass v. the United Kingdom](#), no. 61827/00, § 58, judgment of 9 March 2004;
- [Vo. v. France](#), no. 53924/00, § 35, judgment of 8 July 2004;
- [Evans v. the United Kingdom](#) [GC], no. 6339/05, § 40, judgment of 10 April 2007;
- [Hülya Özalp v. Turkey](#), no. 74300/01, admissibility decision of 11 October 2007  
(Article 5 of the Oviedo Convention cited);
- [Juhnke v. Turkey](#), no. 52515/99, § 56, judgment of 13 May 2008;
- \*\*[M.A.K. and R.K. v. the United Kingdom](#), nos. 45901/05 and 40146/06, § 31, judgment of 23 March 2010;
- \*\*[Daskalovi v. Bulgaria](#), no. 27915/06, admissibility decision of 23 November 2010  
(declared inadmissible; Articles 5 and 8 of the Oviedo Convention cited);
- \*\*[R.R. v. Poland](#), no. 27617/04, § 83, judgment of 26 May 2011;
- \*\*[Arskaya v. Ukraine](#), no. 45076/05, admissibility decision of 4 October 2011, (declared admissible);
- \*\*[V.C v. Slovakia](#), no. 18968/07, §§ 76-77, judgment of 8 November 2011;
- \*\*\*[Costa and Pavan v. Italy](#), no. 54270/10, § 21, judgment of 28 August 2012;
- \*\*\*[M.S. v. Croatia \(no. 2\)](#), no. 75450/12, § 51, judgment of 19 February

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<sup>4</sup>. “With the rapid evolution of biomedical techniques, new threats to human dignity may arise. The Convention on Human Rights and Biomedicine, signed at Oviedo in 1997, seeks to cover some of those dangers. However, to date only a limited number of States have signed it. Moreover, this Convention only affords the European Court of Human Rights consultative jurisdiction. In order this ‘fourth generation of human rights’ to be taken into account so that human dignity is protected against possible abuse by scientific progress, the Court could issue a reminder that under Article 2 of the European Convention on Human Rights the States undertook to protect everyone’s right to life by law.

The right to life may of course be interpreted in many different ways, but it undoubtedly includes the freedom to seek to enjoy the best physically available medical treatment.”

2015;

- \*\*\*[Lambert and others v. France](#) [GC], no. 46043/14, § 59, judgment of 5 June 2015;
- \*\*\*[Bataliny v. Russia](#), no. 10060/07, § 55, judgment of 23 July 2015;
- \*\*\*[Parrillo v. Italy](#) [GC], no. 46470/11, §§ 42 and 54, judgment of 27 August 2015.

***B. References to the work of the Steering Committee on Bioethics of the Council of Europe***

- \*\*\*[Vo. v. France](#) [GC], no. 53924/00, § 38 and 39, judgment of 8 July 2004;
- [Wilkinson v. the United Kingdom](#), no. 14659/02, admissibility decision of 8 February 2006;  
(reference to the publication of a consultation paper on protecting the human rights and human dignity of people suffering from mental disorder);
- \*\*\*[A, B, and C v. Ireland](#) [GC], no. 25579/05, §§ 107-108, judgment of 16 December 2010  
(reference to the PACE Resolution 1607 (2008) entitled “Access to safe and legal abortion in Europe”);
- \*\*\*[S.H and Others v. Austria](#) [GC], no. 57813/00, § 35, judgment of 3 November 2011  
(reference to the replies by the member States of the Council of Europe to the Steering Committee on Bioethics’ “Questionnaire on Access to Medically-assisted Procreation” (Council of Europe, 2005));
- \*\*\*[Costa and Pavan v. Italy](#), no. 54270/10, § 25, judgment of 28 August 2012;
- \*\*\*[Konovalova v. Russia](#), no. 37873/04, § 32, judgment of 9 October 2014;
- \*\*\*[Parrillo v. Italy](#) [GC], no. 46470/11, § 54, judgment of 27 August 2015;
- \*\*\*[Paradiso and Campanelli v. Italy](#), no. 25358/12, § 44, judgment of 27 January 2015.