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COMMITTEE ON BIOETHICS (DH-BIO)

Developments in the field of bioethics in the case law of the European Court of Human Rights (ECtHR)

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Recent case-law

Liability of health professionals

Judgments

[Erdinç Kurt and Others v. Turkey](#), no. 50772/11, 6 June 2017

This case concerned two high-risk operations performed on a patient – the applicants' daughter – which left her with severe neurological damage. The applicants maintained that the authorities were responsible for the damage in question, and complained of the lack of an effective remedy by which to assert their rights in the civil proceedings. They alleged that they had contested, without success, the relevance and sufficiency of the expert report on which the domestic courts had based their dismissal of the applicants' compensation claim.

The Court held that there had been **a violation of Article 8 (right to respect for private life)** of the Convention, finding that the applicants had not received an adequate judicial response that satisfied the requirements inherent in the protection of the right to physical integrity of the patient. It noted in particular that the expert report on which the domestic courts had based their dismissal of the applicants' compensation claims, and which concluded that the doctors had not been at fault, had given insufficient explanations regarding the issue on which it was supposed to provide technical insight (the issue whether the doctors had contributed to the damage).

[Carvalho Pinto de Sousa Morais v. Portugal](#), no. 17484/15, 25 July 2017

The case concerned a decision of the Supreme Administrative Court to reduce the amount of compensation awarded to the applicant, a 50-year-old woman suffering from gynaecological complications, as a result of a medical error. An operation in 1995 had left her in intense pain, incontinent and with difficulties in having sexual relations. The applicant alleged in particular that the decision to reduce the amount of compensation was discriminatory because it had disregarded the importance of a sex life for her as a woman.

The Court found **a violation of Article 14 (prohibition of discrimination) read together with Article 8 (right to respect for private and family life)**. The Court found, in particular, that the applicant's age and sex had apparently been decisive factors in the national courts' final decision not only to lower the compensation awarded for physical and mental suffering but also for the services of a maid. The decision had moreover been based on the general assumption that sexuality was not as important for a 50-year-old woman and mother of two children as for someone of a younger age. In the Court's view, those considerations showed the prejudices prevailing in the judiciary in Portugal.

[Rõigas v. Estonia](#), no. 49045/13, 12 September 2017

The case essentially concerned the applicant's complaint of a lack of investigation into her son's alleged maltreatment in hospital following diagnosis of malign melanoma and into the circumstances of his death.

The Court held that there has been **no violation of Article 2 (right to life)**. It was found that the State had put in place adequate remedies by which the cause of death of patients in the care of the medical profession can be determined and that the criminal-law remedy used by the applicant in the present case had been effectively applied.

Compulsory vaccination

Pending case

[Skerlevska v. the former Yugoslav Republic of Macedonia](#), no. 54372/15, communicated on 12 June 2017

The applicant was fined in the amount equivalent to 200 euros for having refused to allow compulsory vaccination of her new-born baby. She complains that she had not been sufficiently informed about the quality of the vaccines and possible side-effects, and alleges an unjustified interference with her parental rights and her freedom of conscience and religious belief.

The Court gave notice of the application to the Government of the former Yugoslav Republic of Macedonia and put questions to the parties under **Article 8** (right to respect for private life).

Protection of genetic data

Judgment

[Aycaguer v. France](#), no. 8806/12, 22 June 2017

The applicant alleged that there had been a breach of his right to respect for his private life on account of the order to provide a biological sample for inclusion in the national computerised DNA database (FNAEG) and the fact that his refusal to comply with that order had resulted in a criminal conviction.

The Court held that there had been a **violation of Article 8 (right to respect for private life)** of the Convention. It observed in particular that on 16 September 2010 the Constitutional Council had given a decision to the effect that the provisions on the FNAEG were in conformity with the Constitution, subject inter alia to "determining the duration of storage of such personal data depending on the purpose of the file stored and the nature and/or seriousness of the offences in question". The Court noted that, to date, no appropriate action had been taken on that reservation and that there was currently no provision for differentiating the period of storage depending on the nature and gravity of the offences committed. The Court also ruled that the regulations on the storage of DNA profiles in the FNAEG did not provide the data subjects with sufficient protection, owing to its duration and the fact that the data could not be deleted. The

regulations therefore failed to strike a fair balance between the competing public and private interests.

Duty to protect patients in psychiatric facilities

Referral to the Grand Chamber

[Fernandes de Oliveira v. Portugal](#), no. 78103/14, case referred to the Grand Chamber on 18 September 2017

The applicant complained that her son, who suffered from mental disorders, committed suicide as a result of a psychiatric hospital's negligence in supervising him. In its Chamber judgment of 28 March 2017, the Chamber held that there had been a **violation of Article 2** (right to life). In the light of the State's positive obligation to take preventive measures to protect an individual whose life is at risk, and the need to take all necessary and reasonable steps in the circumstances, the Court concluded that the hospital staff had failed to adopt safeguards to ensure that he would not leave the premises.

On 18 September 2017 the Grand Chamber Panel accepted the Portuguese Government's request that the case be **referred to the Grand Chamber**.

Pending case

[V.P. v. Estonia](#), no. 14185/14, communicated on 26 November 2014

After attempting to commit suicide, the applicant's son, who suffered from paranoid schizophrenia and had been treated several times in a psychiatric hospital, 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 of the authorities' failure to carry out an effective investigation into the circumstances of her son's death.

The Court gave notice of the application to the Estonian Government and put questions to the parties under **Articles 2 (right to life)** and 35 (admissibility criteria) of the Convention.

Prisoners' health-related rights

Judgment

[Mirzashvili v. Georgia](#), no. 26657/07, 7 September 2017

The case mainly concerned the applicant's complaint that he had not been provided with adequate medical care for cancer and chronic hepatitis C while in detention. In March 2008, following the European Court of Human Rights' indication, under Rule 39 of its Rules of Court (interim measures), that he should be placed in the prison hospital and provided with adequate treatment for his cancer and chronic HCV, the applicant was transferred to the prison hospital.

The Court holds that **there has been a violation of Article 3 (prohibition of inhuman or degrading treatment)** on account of the lack of adequate medical treatment for the applicant's cancer in detention until March 2008. Nevertheless, the Court finds **no violation of Article 3** of the Convention on account of the medical care provided to the applicant after March 2008.

Detention and mental health

Judgments

[S.M.M. v. The United Kingdom](#), No. 77450/12, 22 June 2017

The applicant, who suffers from serious mental illness, complained about his detention pending deportation.

The Court found that there had been a violation of **Article 5 § 1 (right to liberty and security)**. Considering the vulnerability of a serious mentally ill person, the Court concluded that the authorities did not act with sufficient "due diligence" in order to ensure that the detention lasted for the shortest time possible.

[Rooman v. Belgium](#), no. 18052/11, 18 July 2017

The case concerned proceedings brought by the applicant on account of the lack of psychiatric care in the facility in which he was being detained.

The Court found a **violation of Article 3 (prohibition of inhuman or degrading treatment)**. The Court found, in particular, that the national authorities had not provided adequate care for the detainee because of the lack of care staff who could speak German, the only language he knew and one of Belgium's official languages. It held that the applicant, who had been detained for 13 years without appropriate medical support or any realistic prospect of change, had been subjected to distress of an intensity exceeding the unavoidable level of suffering inherent in detention.

[Kuc v. Slovakia](#), no. 37498/14, 25 July 2017

The applicant, who has a history of psychiatric disorder, has been detained pending trial on charges of endangering public safety. His application for release referring to his mental health condition and need for psychiatric treatment was dismissed. Relying on Article 5 § 3, he complained about the excessive length of and lack of relevant and sufficient grounds for his pre-trial detention, arguing in particular that the domestic courts had failed to take into account his mental disorder when assessing the necessity for his continued detention.

The Court found that **there has been a violation of Article 5 § 3 (right to liberty and security/entitlement to trial within a reasonable time or to release pending trial)**. It found in particular that the grounds given by the domestic authorities in response to the applicant's request for release failed to take account of his personal circumstances, notably as regards his psychiatric condition.

Decision on interim measures

[Özakça and Gülmen v. Turkey](#), nos. 45940/17 and 46171/17, 2 August 2017

The applicants have been on hunger strike since 9 March 2017 to protest against their dismissal from their posts as class teacher and researcher, respectively. They have also been detained on remand since 23 May 2017.

On 29 June 2017 the applicants requested the Court to indicate to the Government of Turkey, under Rule 39 of the Rules of Court (interim measures), to release them.

The Court, having examined the applicants' requests in the light of the medical reports, found that the applicants' detention did not pose a real and imminent risk of irreparable harm to the life or limb of the applicants. It therefore **rejected the applicants' request** that the Court order the Government to release them. The Court informed the parties that it expected the Government to **take all necessary measures to ensure that the applicants' rights under Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the Convention are respected.**

Exposure to health hazards

Judgment

[Jugheli and Others v. Georgia](#), no. 38342/05, 13 July 2017

The applicants complained that the State had failed to protect them from the pollution emanating from the thermal power plant located in close proximity to their homes, thus resulting in a severe disturbance to their environment and a risk to their health in violation of Article 8 of the Convention.

The Court held that there had been **a violation of Article 8 (right to respect for home and private life)**. Considering the absence of any regulatory framework applicable to the potentially dangerous activities of the plant and the passive attitude adopted by the Government in the face of the resultant air pollution, it was found that the State did not succeed in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life.

Decision to discontinue artificial ventilation

Decision on the admissibility

[Gard and Others v. UK](#), no. 39793/17, 27 June 2017

This case concerned Charlie Gard, a baby suffering from a rare and fatal genetic disease. In February 2017, the treating hospital sought a declaration from the domestic courts as to whether it would be lawful to withdraw artificial ventilation and provide Charlie with palliative care. Charlie's parents also asked the courts to consider whether it would be in the best interests of their son to undergo experimental treatment in the U.S.A. The domestic courts concluded that it would be lawful for the hospital to withdraw life sustaining treatment because it was likely that Charlie would suffer significant harm if his present suffering was prolonged without any realistic prospect of improvement, and the experimental therapy would be of no effective benefit. In the

proceedings before the European Court, Charlie's parents argued – on their own behalf and that of their son – under Article 2 (right to life) of the Convention that the hospital has blocked access to life sustaining treatment (in the U.S.A.) for Charlie and under Article 5 (right to liberty and security) that, as a result, he is unlawfully deprived of his liberty. They further alleged under Articles 6 (right to a fair trial) and 8 (right to respect for private and family life) that the domestic court decisions amounted to an unfair and disproportionate interference in their parental rights.

The Court has by a majority endorsed in substance the approach by the domestic courts and thus declared the application **inadmissible**. In particular, the Court bore in mind the considerable room for manoeuvre (“wide margin of appreciation”) left to the authorities in the sphere concerning access to experimental medication for the terminally ill and in cases raising sensitive moral and ethical issues, reiterating that it was not for the Court to substitute itself for the competent domestic authorities. From this perspective, the Court gave weight to the fact that a domestic legal framework – compatible with the Convention – was available governing both access to experimental medication as well as withdrawal of life sustaining treatment. Furthermore, the domestic court decisions had been meticulous, thorough and reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and sufficient support for their conclusions; the domestic courts had direct contact with all those concerned; it was appropriate for the hospital to approach the courts in the UK in the event of doubts as to the best decision to take; and, lastly, the domestic courts had concluded, on the basis of extensive, high-quality expert evidence, that it was most likely Charlie was being exposed to continued pain, suffering and distress and that undergoing experimental treatment with no prospects of success would offer no benefit, and continue to cause him significant harm.

Post-mortem examination

Pending cases

[Sherer v. Russia](#), no. 21189/15, communicated on 3 May 2017

The applicant's son died after his co-serviceman threw him to the ground during military service. A post-mortem forensic medical examination carried out by the Ministry of Defence concluded that the applicant's son had not died as a result of the incident. The applicant asked for an independent post-mortem examination to a private institution, but no precise conclusion could be reached due to the fact that the heart had been removed from the body during the first medical examination. The request for the return of the removed heart lodged by the applicant was refused. The applicant complains under Article 2 of the Convention that there has been no effective investigation into his son's death and that the State's retention of the heart has made it impossible for him to obtain an independent expert opinion. He also claims that there has been an interference with his rights under Article 3 and Article 8 of the Convention because he was neither informed of the removal, nor given the possibility to object, and he was deprived of a right to bury his son's body with the heart according to religious customs.

The Court gave notice of the application to the Russian Government and put questions to the parties as to whether under **Article 2 (right to life)**, **Article 8 (right to private and family life)** and **Article 3 (prohibition of inhuman or degrading treatment)** of the Convention.

[Polat v. Austria](#) (no. 12886/16) communicated on 23 May 2017

This case concerns the post-mortem autopsy carried out on the body of the applicant's prematurely born son, who died shortly after his birth, against her expressed wish. The Court gave notice of the application to the Austrian Government and put questions to the parties under **Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion) and 13 (right to an effective remedy)** of the Convention.

Factsheets

Prepared by the Court's Press Service, Factsheets focus on the case law of the Court, and pending cases. These files are not exhaustive and do not bind the Court. The date indicates the latest update of the factsheet.

- [Personal data protection \(September 2017\)](#)
- [Health \(July 2017\)](#)
- [Reproductive rights \(July 2017\)](#)
- [Gestational Surrogacy \(January 2017\)](#)
- [Right to life \(June 2013\)](#)
- [End of life and the European Convention on Human Rights \(June 2017\)](#)
- [Prisoners' health-related rights \(July 2017\)](#)
- [Detention and mental health \(July 2017\)](#)
- [Persons with disabilities and the European Convention on Human Rights \(October 2017\)](#)
- [Children's rights \(February 2017\)](#)
- [Elderly people and the European Convention on Human Rights \(October 2016\)](#)
- [Gender identity issues \(April 2017\)](#)
- [New technologies \(September 2017\)](#)