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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*

[Ioniță v. Romania](#), no. 81270/12, 10 January 2017

This case concerned the death of the applicants' four-year-old son following an operation. The applicants complained that the authorities had failed to effectively investigate the incident, despite their repeated claims that it had been caused by the negligence of medical staff.

The Court held that there had been **a violation of Article 2 (right to life)** under its procedural head, finding that there had not been a proper investigation into the death of the applicants' son, for the following reasons in particular. First, the medical authorities had failed to provide an additional forensic report about the incident, even though one was necessary. Furthermore, the authorities had never established whether the supervising nurse had properly carried out her duties, even though these were highly relevant to the alleged cause of death. Moreover, the domestic courts had also found no medical negligence on behalf of the doctors – even though disciplinary tribunals had found that they had failed to obtain the applicants' informed consent for the procedure, and this consent had been required under Romanian law. Finally, the proceedings had taken an unjustifiably long amount of time, given that six and a half years had elapsed between the death of the applicants' son and the final decision in the case.

[Jurica v. Croatia](#), no. 30376/13, 2 May 2017

The case concerned an allegation of medical negligence and the excessive length of civil proceedings on compensation claims, which were eventually dismissed. The applicant complained about a violation of Articles 6 § 1 and 8 because of the excessive length of the proceedings (14 years) and because of the alleged ineffectiveness of the proceedings.

The Court found that there had been **a violation of Article 6 § 1 (right to a fair hearing within a reasonable time)** because of the excessive length of the proceedings. It further found that there had been **no violation of Article 8 (right to protection of private life)**.

### *Pending case*

[Mayboroda v. Ukraine](#), no. 14709/07, communicated on 9 February 2017

Following a surgical intervention during which one of her kidneys was removed without her knowledge, the applicant complains that the State authorities have not put in place a regulatory framework that would have protected her from the arbitrary concealment by medical professionals attending her in hospital of important information concerning her medical condition and treatment. The applicant invokes Article 3 of the Convention in respect of this complaint. The applicant also complains under Article 13 of the Convention that there was no effective remedy available to her for ventilating the above complaint.

The Court gave notice of the application to the Ukrainian Government and put questions as to whether the State had complied with its positive obligation to put in place a regulatory framework so as to ensure the applicant's right **under Article 8 (right to private life)** to obtain information relating to her health and to decide on her medical treatment and whether the applicant had at her disposal an effective domestic remedy for her complaint under Article 8, as required by **Article 13**.

## **Migration and medical care**

### *Pending case*

[Qaateh and other v. Greece](#), no. 59758/16, communicated on 20 January 2017

The applicants are Syrian nationals who arrived in Greece in September 2016. The first two applicants suffer from serious medical conditions, the third applicant acts as their carer. The first two applicants complain under Article 3 of the Convention that the medical care provided to them since they arrived in Greece was inadequate and has resulted in the deterioration of their health. They also complain, under Article 8, that they never gave their free and informed consent to the various medical interventions carried out as they were never informed of them in a language they understood nor were they provided with an interpreter. The third applicant complains, under Article 3, that the Government's failure to provide adequate medical care to the first two applicants caused him, as their carer, physical and psychological exhaustion that amounted to inhuman and degrading treatment. Lastly, all applicants complain, under Article 13, that they did not have an effective remedy at their disposal in respect of their complaints under Articles 3 and 8 of the Convention.

The Court gave notice of the application to the Greek Government and put questions to the parties under **Articles 3 (prohibition of inhuman or degrading treatment), 8 (private life) and 13 (effective domestic remedy)**.

## Expulsion of ill people

### *Grand Chamber Judgment*

[Paposhvili v. Belgium](#), no. 41738/10, 13 December 2016

This case concerned an order for the applicant's deportation to Georgia, issued together with a ban on re-entering Belgium. The applicant, who suffered from a number of serious medical conditions, including chronic lymphocytic leukaemia and tuberculosis, alleged in particular that substantial grounds had been shown for believing that if he had been expelled to Georgia he would have faced a real risk there of inhuman and degrading treatment and of a premature death. He also complained that his removal to Georgia, ordered together with a ten-year ban on re-entering Belgium, would have resulted in his separation from his family, who had been granted leave to remain in Belgium and constituted his sole source of moral support. The applicant died in June 2016. His wife and her three children subsequently pursued his case before the Court.

The Court held that there **would have been a violation of Article 3 (prohibition of inhuman or degrading treatment)** of the Convention if the applicant had been removed to Georgia without the Belgian authorities having assessed the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, **and a violation of Article 8** (right to respect for private and family life) of the Convention if he had been removed to Georgia without the Belgian authorities having assessed the impact of removal on his right to respect for his family life in view of his state of health.

## Prisoners' health-related rights

### *Judgments*

[Golubar v. Croatia](#), no. 21951/15, 2 May 2017

Relying in particular on Article 3 (prohibition of inhuman or degrading treatment), the applicant alleged that the conditions of his detention had been inadequate and that his state of health had not been compatible with incarceration.

The Court concluded that there had been **no violation of Article 3** as the national authorities had properly assessed all the relevant facts concerning the applicant's state of health and that there were no grounds for it to conclude that the applicant's state of health was not compatible with serving his prison sentence.

[Mustafayev v. Azerbaijan](#), no. 47095/09, 4 May 2017

The case concerned the death of the applicant's son, who had died from smoke inhalation and first and second degree burns when a fire broke out in his prison cell.

Relying in particular on Article 2 (right to life), the applicant alleged that his son had either been deliberately killed by prison guards – who had then tried to cover up the murder by setting fire to his cell – or had died as a result of the authorities' failure to provide appropriate medical care, it having taken almost eight hours to transfer him to hospital despite his having serious burns.

The Court found that there had been a **violation of Article 2 (right to life)**.

## **Detention and mental health**

### *Judgment*

[Maria da Glória Fernandes de Oliveira v. Portugal](#), no. 78103/14, 28 March 2017

The applicant complained that her son had committed suicide as a result of a psychiatric hospital's negligence in supervising him. The applicant's son suffered from mental disorders, and was repeatedly admitted to a psychiatric hospital. In April 2000 he was admitted to the same institution, because he had attempted to commit suicide. On 27 April 2000 he left the premises without notifying the hospital authorities, and committed suicide by jumping in front of a train. The applicant lodged a civil action for damages against the hospital, claiming that her son should have been under medical supervision and that the hospital staff should have prevented him from leaving the premises. Her claim was dismissed on the grounds that the suicide had not been foreseeable and the hospital had not breached any duty of care. The applicant complained that the authorities had failed to protect the life of her son and had been responsible for his death, in violation of his rights under Article 2 (right to life).

The Court found 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. The Court considered that the instant case was distinguishable from the case of [Hiller v. Austria](#) (no 1967/14, 22 November 2016), in which there were no signs in the hospital records of any suicidal thought or attempt.

## **Removal of Organs**

### *Pending case*

[Valyushenko v. Russia](#), no. 51283/14, communicated on 10 January 2017

The application concerns removal of the applicant's son's organs after his death for the purpose of transplantation, in the absence of the applicant's explicit consent.

The case was communicated to the Russian Government under **Article 8 (right to respect for private and/or family life)**, reference being made to the cases of [Petrova v. Latvia](#) and [Elberte v. Latvia](#).

## **Reproductive rights**

### **Access to medically-assisted procreation**

#### *Pending case*

[Charron and Merle-Montet v. France](#),<sup>1</sup> no. 22612/15, communicated on 19 January 2017

This case concerns the inability of homosexual couples to access medically-assisted procreation. The Court gave notice of the application to the French Government and put questions to the parties under **Articles 8 (right to respect for private and family life), 14 (prohibition of discrimination)** and 35 (admissibility criteria) of the Convention.

## Surrogacy

### *Grand Chamber Judgment*

[Paradiso and Campanelli v. Italy](#), no. 25358/12, 24 January 2017

This case concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into with a Russian woman by an Italian couple (the applicants); it subsequently transpired that they had no biological relationship with the child. The applicants complained, in particular, about the child's removal from them, and about the refusal to acknowledge the parent-child relationship established abroad by registering the child's birth certificate in Italy.

The Grand Chamber found, by eleven votes to six, that there had been **no violation of Article 8 (right to respect for private and family life)** in the applicants' case. Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Grand Chamber held that a family life did not exist between the applicants and the child. It found, however, that the contested measures fell within the scope of the applicants' private life. The Grand Chamber further considered that the contested measures had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. On this last point, it regarded as legitimate the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children.

The Grand Chamber also accepted that the Italian courts, having concluded in particular that the child would not suffer grave or irreparable harm as a result of the separation, had struck a fair balance between the different interests at stake, while remaining within the room for manoeuvre ("margin of appreciation") available to them.

## Gender Identity issues

### *Decision on the admissibility*

[D.Ç. v. Turkey](#)<sup>2</sup>, no. 10684/13, 7 February 2017

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<sup>1</sup> Statement of Fact available in French only.

<sup>2</sup> Decision available in French only

The applicant, a transsexual whose gender reassignment has not yet been carried out, complained of the refusal of the authorities of the Ministry of Justice to bear the cost of her gender reassignment despite medical evidence which, she submitted, clearly showed that she urgently needed treatment.

The Court declared the application **inadmissible, for non-exhaustion of domestic remedies**, pursuant to Article 35 §§ 1 and 4 (admissibility criteria) of the Convention.

### *Judgment*

[A.P., Garçon and Nicot v. France](#), nos 79885/12, 52471/13 and 52596/13, 6 April 2017

This case concerned three transgender persons of French nationality who wished to change the entries concerning their sex and their forenames on their birth certificates, and who were not allowed to so do by the courts in the respondent State. The applicants submitted, among other points, that the authorities had infringed their right to respect for their private life by making recognition of sexual identity conditional on undergoing an operation involving a high probability of sterility.

The Court held **that there had been a violation of Article 8 (right to respect for private life)** of the Convention in respect of the second and third applicants, on account of the obligation to establish the irreversible nature of the change in their appearance. It further held that there had been no violation of Article 8 of the Convention, in respect of the second applicant, on account of the obligation to prove that he actually suffered from gender identity disorder and, in respect of the first applicant, on account of the obligation to undergo a medical examination. The Court held, in particular, that making recognition of the sexual identity of transgender persons conditional on undergoing an operation or sterilising treatment to which they did not wish to submit amounted to making the full exercise of one's right to respect for private life conditional on relinquishing full exercise of the right to respect for one's physical integrity.



## 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 \(April 2017\)](#)
- [Health \(January 2017\)](#)
- [Reproductive rights \(January 2017\)](#)
- [Gestational Surrogacy \(January 2017\)](#)
- [Right to life \(June 2013\)](#)
- [End of life and the European Convention on Human Rights \(July 2015\)](#)
- [Prisoners' health-related rights \(January 2017\)](#)
- [Detention and mental health \(September 2016\)](#)
- [Persons with disabilities and the European Convention on Human Rights \(March 2017\)](#)
- [Children's rights \(February 2017\)](#)
- [Elderly people and the European Convention on Human Rights \(October 2016\)](#)
- [Gender identity issues \(April 2017\)](#)
- [New technologies \(March 2017\)](#)