

## Structure of the presentation

1. Introductory remarks
2. Positive obligations and access to medical services
3. Discrimination (based on age)
4. Family life: access to sick relatives; right to attend funerals

### 1. Introductory remarks

- The Convention system has emerged from a large – perhaps it would be fair to say – unprecedented crisis of the Second World War. It was a humanitarian, economic, health and – above all – a rule of law crisis
- During its existence, the Convention system did not face a health/sanitary crisis of the intensity we are experiencing now but it did face different other emergencies and exceptional situations, including those relating to health care issues
- The challenges to the system came from the totalitarian regimes,<sup>1</sup> terrorism,<sup>2</sup> internal conflicts and wide-scale military and police operations,<sup>3</sup> complexity of the processes of transitional post-conflict justice and reconciliation,<sup>4</sup> external military operations of the member States,<sup>5</sup> recent armed conflicts between the member States,<sup>6</sup> internal emergencies such as attempts of coup d'état,<sup>7</sup> large scale economic crisis<sup>8</sup>

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<sup>1</sup> See, for instance, the Greek case of the European Commission of Human Rights (*Denmark, Norway, Sweden and the Netherlands v. Greece*, no. 3321/67 et al.).

<sup>2</sup> See, for instance, *Lawless v. the United Kingdom*, no. 332/57, 14 November 1960.

<sup>3</sup> For instance, the Russian government's activities in the North Caucasus (see, for instance, *Isayeva, Yusupova and Bazayeva v. Russia*, no. 57947/00 et al., 24 February 2005) and Turkish security forces' actions in south-eastern Turkey (see, for instance, *İlhan v. Turkey* [GC], no. 22277/93, 27 June 2000).

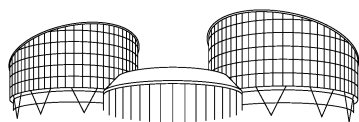
<sup>4</sup> A number of issues have arisen in the context of the post-conflict transitional justice in the countries of the former Yugoslavia (see, for instance, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, ECHR 2014).

<sup>5</sup> In particular, the military operations in Iraq (see, for example, *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014).

<sup>6</sup> This gave rise to a number of Inter-state cases, such as *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001; *Georgia v. Russia* [GC], no. 13255/07, 3 July 2014; *Ukraine v. Russian Federation* (no. 20958/14 et al.). However, it also gave rise to individual applications, with a strong inter-state inspiration, such as *Sargsyan v. Azerbaijan* [GC], no. 40167/06, 16 June 2015; *Chiragov and Others v. Armenia* [GC], no. 13216/05, 16 June 2015.

<sup>7</sup> Concerning most recent attempt of coup d'état in Turkey (see, for instance, *Şahin Alpay v. Turkey*, no. 16538/17, 20 March 2018).

<sup>8</sup> See, for instance, *Mamatras and Others v. Greece*, nos. 63066/14 and 2 others, 21 July 2016.



- In its case-law, the Court also had to address the different adverse effects of some of the most pressing world health pandemics relating to, for instance, HIV,<sup>9</sup> tuberculosis and hepatitis<sup>10</sup>
- A common thread in the Court's approach to these cases is the insistence on the observance of the rule of law and the necessity to ensure proportionality of any measure taken that is capable of adversely affecting the rights of an individual, particularly when this concerns the individual's effective enjoyment of intimate or key rights
- Nevertheless, generally, States enjoy a certain margin of appreciation when addressing unprecedented large-scale events and emergencies
- In some instances – as institutionally recognised under Article 15 of the Convention – in times of extreme emergency threatening the life of a nation, governments are unable to ensure the respect for certain rights under the Convention and can then legitimately make derogation from those rights
- In this connection, amongst the countries here represented, the following derogations under Article 15 were made:
  - Albania: Articles 8 and 11; Articles 1 and 2 of Protocol No. 1; Article 2 of Protocol No. 4
  - Serbia very broad declaration under Article 15 of the Convention
  - North Macedonia: Articles 8 and 11; Article 2 of Protocol No. 1; Article 2 of Protocol No. 4
- However, as there is a serious risk of abuse of emergency situations, governments must be ready to justify the measures taken in the light of the relevant Convention requirements.<sup>11</sup> This can, on the one hand, legitimise their political decision to introduce the emergency measures and, on the other hand, secure an effective protection of human rights and the rule of law to the individuals concerned with the introduction of such measures. The verification of the governmental justification in question is a shared task of the national courts and the Court<sup>12</sup>

## **2. Positive obligations and access to medical services**

- The right to health – recognised in numerous international instruments – is not as such among the rights guaranteed under the Convention<sup>13</sup>
- However, failure of the State to regulate the manner of provision of healthcare, structural deficiencies in the provision of medical care, or denial of access to otherwise available healthcare may, under certain circumstances, raise an issue of the authorities' positive obligations under the Convention (substantive positive obligation)

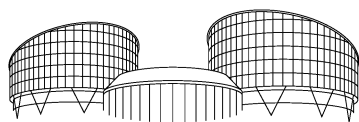
<sup>9</sup> See, for instance, *Kiyutin v. Russia*, no. 2700/10, ECHR 2011.

<sup>10</sup> See, for instance, *Cătălin Eugen Micu v. Romania*, no. 55104/13, 5 January 2016.

<sup>11</sup> See, for instance, *Alparslan Altan v. Turkey*, no. 12778/17, §§ 116-119, 16 April 2019.

<sup>12</sup> See further, K. Kamber, "Limiting State Responsibility under the European Convention on Human Rights in Time of Emergency: An Overview of the Relevant Standards", 1 *European and Comparative Law E-Journal* (2017), pp. 28-29.

<sup>13</sup> *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 165, 19 December 2017; *Vasileva v. Bulgaria*, no. 23796/10, § 63, 17 March 2016.



- In addition, the States have a duty to set up an effective and independent judicial system 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 (procedural positive obligation)<sup>14</sup>
- In the context of health care, issues may arise under the following Articles of the Convention:
  - Article 2 – if the person concerned has died, or there was a real and imminent risk of death<sup>15</sup>
  - Article 3 – if a failure to provide appropriate medical treatment results in such suffering on the part of the victim that the level of seriousness under Article 3 is reached<sup>16</sup>
    - In this connection, the concept of “degrading treatment” is of a particular importance
    - In general, “degrading treatment” designates a situation where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity.<sup>17</sup> However, this relates to “treatment” to which an individual was “subjected”<sup>18</sup> and thus has limited importance in the health care context
    - The relevant test thus more appropriately relates to the question of whether there was a “manifest indifference” on the part of health care professionals towards an individual’s situation<sup>19</sup>
  - Article 8 - if a failure to provide appropriate medical treatment results in an infringement of a person’s physical integrity<sup>20</sup>
- In the great majority of cases issues will arise under Articles 2 and 8 of the Convention, which in this context provide for comparable obligations<sup>21</sup>
- States have a margin of appreciation in choosing how to comply with their positive obligations under the Convention<sup>22</sup>
  - Issues such as the allocation of public funds in the area of health care are not a matter on which the Court should take a stand
  - It is for the competent authorities of the Contracting States to consider and decide how their limited resources should be allocated

<sup>14</sup> *Lopes de Sousa Fernandes*, cited above, § 214.

<sup>15</sup> *Ibid.*; *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, §§ 140-142, 25 June 2019.

<sup>16</sup> *R.R. v. Poland*, no. 27617/04, §§ 152-161, ECHR 2011 (extracts).

<sup>17</sup> *Bouyid v. Belgium* [GC], no. 23380/09, § 87, ECHR 2015.

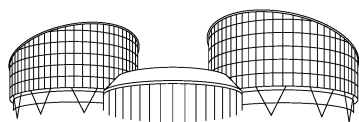
<sup>18</sup> *Nicolae Virgiliu Tănase*, cited above, § 123.

<sup>19</sup> *Hristozov and Others v. Bulgaria*, nos. 47039/11 and 358/12, § 112, ECHR 2012 (extracts). See also, *Tarakhel v. Switzerland* [GC], no. 29217/12, § 98, ECHR 2014 (extracts), concerning the test of “official indifference” in the context of provision of social services in general.

<sup>20</sup> *Vaslieva*, cited above, § 63; *Nicolae Virgiliu Tănase*, cited above, § 127 *in fine*.

<sup>21</sup> *Jurica v. Croatia*, no. 30376/13, §§ 84 and 86, 2 May 2017.

<sup>22</sup> *Lopes de Sousa Fernandes*, cited above, § 175; *Vasileva*, cited above, § 67.



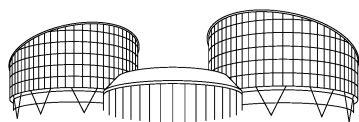
- However, they must take responsibility for the difficult choices which have to be made between worthy need
- The content of the substantive positive obligation:<sup>23</sup>
  - Duty to provide a regulatory framework and to ensure its effective functioning (implementation, supervision and enforcement)<sup>24</sup>
  - Ensure that an individual patient's life and/or physical integrity is not knowingly put in danger by denial of access to the relevant emergency treatment
  - Ensure that there is no structural dysfunction in hospital services which may result in a patient being deprived of access to the relevant treatment where the authorities knew about or ought to have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting the patients' lives and/or physical integrity in danger
- However, responsibility under the substantive positive obligations arises only if: (1) the acts and omissions of the health-care providers went beyond a mere error or medical negligence; (2) the dysfunction at issue must be objectively and genuinely identifiable as systemic or structural in order to be attributable to the State authorities, and must not merely comprise individual instances where something may have been dysfunctional in the sense of going wrong or functioning badly; (3) there must be a link between the dysfunction complained of and the harm which the patient sustained; and (4) the dysfunction at issue must have resulted from the failure of the State to meet its obligation to provide a regulatory framework
- In the context of the current pandemic, the above principles have to be interpreted with regard to the following facts:
  - This is not a government made risk, threat or emergency, or a situation which arose due to the government's failure to supervise certain activity, where specific considerations may apply<sup>25</sup>
  - This is not a context where the authorities would have a direct and specific duty of provision of health care to a particular group of persons under their control (prisons, psychiatric internment)<sup>26</sup>
- The critical considerations:
  - This is a global and wide scale health care crisis where the government could have expected that it would affect a wide group of people and thus needed to put in place an effective regulatory framework to address it

<sup>23</sup> This assessment is based on the case-law in *Lopes de Sousa Fernandes*, (cited above, §§ 185-196), which concerns Article 2 and is – on the basis of the principle of “parallel obligations” under Articles 2 and 8 – adjusted to accommodate the relevant considerations under Article 8.

<sup>24</sup> See, for instance, *Aydoğdu v. Turkey*, no. 40448/06, 30 August 2016, concerning a well-known chronic deficiency of a health care system endangering a particular group of patients; see also *Sarishvili-Bolkvadze v. Georgia*, no. 58240/08, §§ 73-77, 19 July 2018.

<sup>25</sup> *Finogenov and Others v. Russia*, nos. 18299/03 and 27311/03, §§ 243-252, ECHR 2011 (extracts); *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, 24 July 2014.

<sup>26</sup> *Lopes de Sousa Fernandes*, cited above, § 163.



- Whether there were dysfunctions in the operation of the system
- Whether the necessary diligence was deployed to ensure the provision of emergency treatment to a certain group of patients known to be a particular category of persons at risk
- As regards the issues of medical testing
  - Refusal of a request for testing could potentially raise an issue in case of a real and imminent risk to life/physical integrity and if this can be shown to be linked to a failure of the authorities to undertake the necessary measures to prevent that risk from materialising, which is the result of a general dysfunction of the system
  - Compulsory testing is an interference with Article 8 and its proportionality will have to be assessed in each individual case<sup>27</sup>
    - Testing should not amount to degrading treatment<sup>28</sup>
- Access to medication: States have a broad margin of appreciation in regulating issues concerning the authorising the use of a particular medication<sup>29</sup>

### 3. Discrimination (based on age)

- When discussing “discrimination”, it is important to bear in mind the difference between the colloquial usage of that term and its legal Convention meaning
- Under the Convention the term “discrimination” designates a difference in the treatment of persons in analogous, or relevantly similar, situations – or a failure to treat differently persons whose situations are significantly different – which has no objective and reasonable justification<sup>30</sup>
- Two provisions are relevant in this context:
  - Article 14 of the Convention – applies only in conjunction with another substantive provision and provided that the matter complained of falls within the “ambit” of that provision
  - Article 1 of Protocol No. 12 – general and wide-reaching prohibition of discrimination: (1) in the enjoyment of any right specifically granted to an individual under national law; (2) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner; (3) by a public authority in the exercise of discretionary power; (4) by any other act or omission by a public authority<sup>31</sup>
- Discrimination must also relate to a particular status of a person. Article 14 lists different aspects of such a status and does not explicitly mention “age”

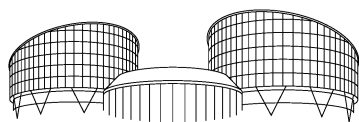
<sup>27</sup> *Caruna v. Malta* (dec.), no. 41079/16, § 30, 15 May 2018; *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, §§ 155-191, 18 January 2018.

<sup>28</sup> *Toomey v. the United Kingdom* (dec.), no. 37231/97, 14 September 1999.

<sup>29</sup> *Hristozov and Others*, cited above; *Durisotto v. Italy* (dec.), no. 62804/13, 6 May 2014.

<sup>30</sup> See, for example, *Guberina v. Croatia*, no. 23682/13, §§ 69-70, 22 March 2016.

<sup>31</sup> See further, [Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention](#), p. 10.



- However, Article 14 contains the category of “other status” which is normally interpreted broadly and includes age<sup>32</sup>
  - North Macedonia in its declaration under Article 15 of the Convention explicitly gave assurance that the measures of derogation would not be adopted so as to create any discrimination on the basis of race, sex, ethnic origin, language, religion, political or other conviction, social status, education and other personal circumstances
- The concept of “objective and reasonable” justification requires that a difference in treatment pursues a “legitimate aim” and that there is a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised
- In this context, States enjoy a certain margin of appreciation, the scope of which will vary according to the circumstances, the subject matter and the background<sup>33</sup>
- The Court has not so far suggested that discrimination on grounds of age should be equated with other “suspect” grounds of discrimination<sup>34</sup>
- This should normally give the domestic authorities a broad margin of appreciation when designating policies for regulating the situation of older persons in times of the pandemic
- Nevertheless, different considerations may apply if the older person in question has a disability or is otherwise particularly vulnerable in which case the State’s margin of appreciation is substantially narrower and the State must have very weighty reasons for any difference in treatment<sup>35</sup>

#### **4. Family life: access to sick relatives; right to attend funerals**

- Lack of access to a sick relative or interference with the way in which a person pays respect to a deceased relative raises an issue of private and/or family life under Article 8
- Normally, such issues arise in the context of persons deprived of liberty<sup>36</sup> but may also arise in other contexts<sup>37</sup>
- Any such interference must be (1) lawful, (2) pursue legitimate aim, and (3) proportionate
- The concept of lawfulness:
  - The existence of a legal basis for any such interference – the term “law” is to be understood in its “substantive” rather than “formal” sense, and may include both enactments of lower rank than statutes as well as unwritten law (case-law)<sup>38</sup>
  - The requisite quality of the law: accessible, foreseeable and certain<sup>39</sup>

<sup>32</sup> *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 45, 25 July 2017.

<sup>33</sup> *Schwizgebel v. Switzerland*, no. 25762/07, §§ 77-79, ECHR 2010 (extracts).

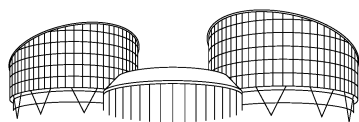
<sup>34</sup> *British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, § 88, 15 September 2016.

<sup>35</sup> *Guberina*, cited above, § 73.

<sup>36</sup> See further, [Guide on the case-law of the European Convention on Human Rights: Prisoners’ rights](#), pp. 23-24.

<sup>37</sup> See further, [Guide on Article 8 of the European Convention on Human Rights](#), pp. 28-29.

<sup>38</sup> *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A.



- The following considerations, drawn from the existing case-law, may be relevant in the current circumstances of the pandemic:

- Safety and health concerns
- Logistical difficulties
- Timing – regarding the provision of information and the possibility of organisation of the visit
- Duration of the restriction
- The existence of alternatives for a lack of access and the effectiveness/appropriateness of such alternatives

## **5. Conclusion**

- The current pandemic is a challenging occurrence not only for the healthcare systems but also for the rule of law, respect for human rights and democracy
- The first cases are coming to the Court and the Court will need to deal with different legal questions concerning various aspects of life affected by the pandemic. It certainly has the capacity, knowledge and experience to deal with such events
- However, the current crisis puts a challenging task before the national authorities, notably the courts, which will need to comply with their Convention obligations in accordance with the principle of subsidiarity
- In that respect, knowledge and analysis of the current case-law of the Court are crucial and thus initiatives like the current one are essentially to ensure that the pandemic is effectively “legally controlled”

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<sup>39</sup> *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 169, 24 January 2017.