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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

### Personal medical records

#### *Communicated application*

[Sokolow v. Germany](#) 8 March 2016

The applicant complains that the German courts' refusal to provide him with a copy of his entire prison medical records violated his right to private life.

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

#### *Judgment*

[Y.Y. v. Russia](#), 23 February 2016 (not final)

The applicant complained that her medical record had been collected by a public authority and disclosed to other authorities without her consent. **Violation of Article 8** (right to respect for private and family life).

### Discrimination on ground of health

#### *Admissibility decision*

[Spycher v. Switzerland](#) 10 December 2015 (final)

The case concerned the rejection of an application for an invalidity pension made by a person suffering from an illness not covered by the invalidity insurance scheme.

The Court considered that the difference between a syndrome with no underlying organic cause, such as that from which the applicant suffered, and one with an underlying organic cause was a matter of objective medical diagnosis. The fact that the applicant, on the basis of that objective distinction, had not obtained an invalidity pension did not amount to discrimination against her, as the two situations were not analogous or relevantly similar. Accordingly, the Court rejected the application as being **manifestly ill-founded**.

#### *Judgment*

[Novruk and Others v. Russia](#) 15 March 2016 (not final)

All five applicants wished to obtain residence permits in Russia. To complete their application, they were required to have a medical examination which included a mandatory test for HIV infection. After they tested positive for HIV, the migration authorities refused their applications by reference to the Foreign Nationals Act, which prevents HIV-positive foreign nationals from obtaining residence permits. The applicants alleged in particular that they had been discriminated against because they

were HIV-positive.

The Court held that **there had been a violation of Article 14** (prohibition of discrimination) **read together with Article 8** (right to private life and family) of the Convention. It notably noted that the legislation aimed at preventing HIV transmission, which was used in the present case to exclude the applicants from entry or residence, had been based on an unwarranted assumption that they would engage in unsafe behaviour, without carrying out a balancing exercise involving an individualised assessment in each case. Given the overwhelming European and international consensus geared towards abolishing any outstanding restrictions on entry, stay and residence of people living with HIV, who constitute a particularly vulnerable group, the Court found that Russia had not advanced compelling reasons or any objective justification for their differential treatment for health reasons. The applicants had therefore been victims of discrimination on account of their health status.

The Court also found that the defective legislation which gave rise to the proceedings in the applicants' case amounted to a structural problem which could generate further repetitive applications. Noting, however, that legislative reform was currently under way in Russia, the Court decided at this stage not to formulate any general measures about the proper implementation of its present judgment.

## **Liability of health professionals**

### *Chamber Judgment/Referral to the Grand Chamber*

[Lopes de Sousa Fernandes v. Portugal](#) 16 December 2015 (Chamber judgment) – case referred to the Grand Chamber on 2 May 2016

This case concerns the death of the applicant's husband following nasal polyp surgery and the subsequent procedures opened for various instances of medical negligence. The applicant alleges in particular a violation of her late husband's right to life.

In its Chamber judgment of 15 December 2015, the Court held that there **had been a violation of Article 2** (right to life) as to the right to life and, unanimously, that there had been a violation of Article 2 as concerned the related investigation. The Chamber found in particular that the mere fact that the patient had undergone a surgical operation presenting a risk of infectious meningitis should have warranted a medical intervention in conformity with the medical protocol on post-operative supervision. Without wishing to speculate on the chances of survival of the applicant's husband, the Chamber took the view that the lack of coordination between the ear, nose and throat department and the emergencies unit inside the hospital revealed a deficiency in the public hospital service, depriving the patient of the possibility of accessing appropriate emergency care. The Chamber further found that the Portuguese legal system had not functioned effectively. The Chamber found, lastly, that the patient should have been clearly informed by the doctors prior to the operation about the risks incurred.

On 2 May 2016 the Grand Chamber Panel accepted the Portuguese Government's request that the case **be referred to the Grand Chamber**.

## Prisoners' health-related rights

### *Judgment*

[Ivko v. Russia](#) 15 December 2015 (final)

The case concerned the applicant's complaint that he had not been provided with appropriate medical care while in detention. The Court found a **violation of Article 3** (prohibition of inhuman or degrading treatment).

### *Judgment*

[Cătălin Eugen Micu v. Romania](#) 5 January 2016 (final)

The applicant alleged, among other things, that he had caught hepatitis C while in prison and that the competent authorities had not fulfilled their obligation to provide him with appropriate medical treatment.

The Court held that there had been **no violation of Article 3** (prohibition of inhuman or degrading treatment). It noted in particular that the spread of transmissible diseases should be a major public health concern, especially in prisons. For the Court, it would therefore be desirable if, with their consent, prisoners could benefit, within a reasonable time after being committed to prison, from free screening for hepatitis or HIV/AIDS. The existence of such a possibility in the present case would have facilitated the examination of the applicant's allegations as to whether or not he contracted the disease in prison. However, in the applicant's case, although the disease in question was diagnosed when he was under the responsibility of the prison authorities, it was not possible for the Court, in the light of the evidence, to conclude that this was the result of a failure by the State to fulfil its positive obligations. As further regards the medical treatment for hepatitis C in prison, the Court found that the authorities had satisfied their obligation to provide the applicant adequate medical treatment for his condition.

### *Grand Chamber Judgment*

[Mozer v. the Republic of Moldova and Russia](#) 23 February 2016

The applicant, who is suffering from bronchial asthma, respiratory deficiency and other conditions, complained in particular that he was deprived of medical assistance and held in inhuman conditions of detention by the authorities of the self-proclaimed "Moldovan Republic of Transdnistria" (the "MRT"). He submitted that both Moldova and Russia were responsible for these actions.

The Court concluded that the Republic of Moldova, having fulfilled its obligations in respect of the applicant by making significant legal and diplomatic efforts to support him, had not violated his rights under the Convention. At the same time, having regard to its finding that Russia had exercised effective control over the "MRT" during the period in question, it concluded that Russia was responsible for the violations of the Convention. Concerning the applicant's allegation that he had not been given the medical assistance required by his condition during his detention, **the Court held that there had been a violation of Article 3** (prohibition of inhuman or degrading treatment) of the Convention by Russia. It observed in particular that although the doctors had considered the applicant's condition to be deteriorating and the specialists

and equipment required to treat him to be lacking, the “MRT” authorities had not only refused to transfer him to a civilian hospital for treatment but they had also exposed him to further suffering and a more serious risk to his health by transferring him to an ordinary prison. Given the lack of any explanation for the refusal to offer him appropriate treatment, the Court found that the applicant’s medical assistance had not been adequately secured.

## **Detention and mental health**

### *Judgment*

[Bamouhammad v. Belgium](#) (final) 17 November 2015

Suffering from Ganser syndrome (or “prison psychosis”), the applicant alleged that he had been subjected while in prison to inhuman and degrading treatment which had affected his mental health. He also complained about a lack of effective remedies.

The Court held that **there had been a violation of Article 3** (prohibition of inhuman or degrading treatment), finding that the level of seriousness required for treatment to be regarded as degrading, within the meaning of Article 3, had been exceeded in the applicant’s case. The Court noted in particular that the need for a psychological supervision of the applicant had been emphasised by all the medical reports. However, his endless transfers had prevented such supervision. According to the experts, his already fragile mental health had not ceased to worsen throughout his detention. The Court concluded that the prison authorities had not sufficiently considered the applicant’s vulnerability or envisaged his situation from a humanitarian perspective.

### *Judgment*

[Mäder v. Switzerland](#) (final) 8 December 2015

(available in French only)

The case concerned the applicant’s detention on grounds of protective care, ordered by the guardianship authority, and the length of time taken to examine his applications for release. The applicant notably complained about the requirement to obtain a prior decision from the guardianship authority before applying to the courts. The Court found a violation of Article 5 § 4 (right to a speedy review of the lawfulness of detention).

### *Judgment*

[Isenc v. France](#) (final) 4 February 2016

This case concerned the applicant’s son’s suicide 12 days after he was admitted to prison. The applicant alleged a violation of his son’s right to life.

The Court held that **there had been a violation of Article 2** (right to life) of the Convention, finding that in the present case, although provided for in the domestic law, the arrangements for collaboration between the prison and medical services in supervising inmates and preventing suicides had not worked. The Court noted in particular that a medical check-up of the applicant’s son, when he was admitted was a minimum precautionary measure. However, even though the French Government submitted that the applicant’s son had had a medical consultation, it failed to furnish any document corroborating that submission and thus had not proved that the latter had been examined by a doctor. In the absence of any proof of an appointment with the prison medical service, the Court considered that the authorities had failed to comply

with their positive obligation to protect the applicant's son's right to life.

### *Grand Chamber Judgment*

[Blokhin v. Russia](#) 23 March 2016

The case concerned the detention for 30 days of a 12-year old boy, who was suffering from a mental and neurobehavioural disorder, in a temporary detention centre for juvenile offenders. The Court found that the boy had not received adequate medical care for his condition at the temporary detention centre, in **violation of Article 3** (prohibition of inhuman or degrading treatment). His placement in the centre could not be justified under Article 5 § 1 (d), as “detention of a minor by lawful order for the purpose of educational supervision”, since it had not served an educational purpose. The applicant's defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention.

Furthermore the Court underlined that it was essential for adequate procedural safeguards to be in place to protect the best interest and well-being of a child when his or her liberty was at stake. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected.

### *Grand Chamber Judgment*

[Murray v. the Netherlands](#) 26 April 2016

This case concerned the complaint by a man convicted of murder in 1980, who consecutively served his life sentence on the islands of Curaçao and Aruba (part of the Kingdom of the Netherlands) – until being granted a pardon in 2014 due to his deteriorating health –, about his life sentence without any realistic prospect of release. The applicant – who in the meantime passed away – notably maintained that he was not provided with a special detention regime for prisoners with psychiatric problems.

The Grand Chamber held that there **had been a violation of Article 3** (prohibition of inhuman or degrading punishment or treatment), finding that the applicant's life sentence had not de facto been reducible. It observed in particular that although he had been assessed, prior to being sentenced to life imprisonment, as requiring treatment, he had never been provided with any treatment for his mental condition during the time he was imprisoned. In this case the Court also underlined that States were under an obligation to provide detainees suffering from health problems – including mental health problems – with appropriate medical care.

## **Reproductive rights**

### **Home births**

#### *Grand Chamber hearing*

[Dubská and Krejzová v. the Czech Republic](#)

This case concerns the prohibition under Czech law on midwives assisting home births. Both applicants complain that mothers have no choice but to give birth in a hospital if they wish to be assisted by a health professional.

In its Chamber judgment of 11 December 2014 the Court held that there had been no violation of Article 8 (right to respect for private and family life). It took into consideration, in particular, that there was no European consensus on whether or not

to allow home births, and that this question involved the allocation of financial resources, for example for an adequate emergency system for home births. The Court thus found that States had a lot of room for manoeuvre (“margin of appreciation”) in regulating this issue. Moreover, the applicants did not have to bear a disproportionate burden on account of the fact that they could only be assisted by a medical professional if giving birth in a hospital.

On 1 June 2015 the case was referred to the Grand Chamber at the request of the applicants. On **2 December 2015 the Court held a Grand Chamber hearing in the case.**

## Surrogacy

### *Grand Chamber hearing*

#### [Paradiso and Campanelli v. Italy](#)

This case concerns 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 by a couple (the applicants); it subsequently transpired that they had no biological relationship with the child. The applicants complain, 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.

In its Chamber judgment of 27 January 2015 the Court held that there had been a violation of Article 8 (right to respect for private and family life). It considered in particular that the public-policy considerations underlying the Italian authorities’ decisions – finding that the applicants had attempted to circumvent the prohibition in Italy on using surrogacy arrangements and the rules governing international adoption – could not take precedence over the best interests of the child, in spite of the absence of any biological relationship and the short period during which the applicants had cared for him. Reiterating that the removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the Court concluded that, in the present case, the conditions justifying a removal had not been met. The Court further noted, however, that these conclusions were not to be understood as obliging the Italian State to return the child to the applicants, as he had undoubtedly developed emotional ties with the foster family with whom he had been living since 2013.

On 1 June 2015 the case was referred to the Grand Chamber at the request of the Italian Government. On **9 December 2015 the Court held a Grand Chamber hearing in the case.**

## Childrens’ rights

### *Grand Chamber Judgment*

[Blokhin v. Russia](#) 23 March 2016 (see above, p. 7)

## Gender identity issues

### *Communicated application*

[S.V. v. Italy](#) 20 March 2016  
(in French only)

This case concerns the inability for the applicant to have her name changed in the absence of gender reassignment surgery.

The Court gave notice of the application to the Italian Government and put questions to the parties under Article 8 (right to respect for private and family life) 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 \(April 2016\)](#)
- [Health \(May 2016\)](#)
- [Detention and mental health \(April 2016\)](#)
- [Prisoners' health-related rights \(February 2016\)](#)
- [End of life and the European Convention on Human Rights \(July 2015\)](#)
- [Reproductive rights \(December 2015\)](#)
- [Right to life \(June 2013\)](#)
- [New technologies \(April 2016\)](#)
- [Persons with disabilities and the European Convention on Human Rights \(March 2016\)](#)
- [Children's rights \(April 2016\)](#)
- [Gender identity issues \(April 2016\)](#)