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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 health-related data

Judgment

[Vukota-Bojic v. Switzerland](#), no. 61838/10, 18 October 2016

The applicant had been involved in a road traffic accident, and subsequently requested a disability pension. Following a dispute with her insurer on the amount of disability pension and years of litigation later, her insurer requested that she undergo a fresh medical examination, in order to establish additional evidence about her condition. When she refused, the insurer hired private investigators to conduct secret surveillance of her. The evidence that they obtained was used in subsequent court proceedings, which resulted in a reduction of the applicant's benefits. She complained that the surveillance had been in breach of her right to respect for private life, and that it should not have been admitted in the proceedings.

The Court held that there had **been a violation of Article 8** (right to respect for private life). It found in particular that the insurer's actions engaged state liability under the Convention, since the respondent insurance company was regarded as a public authority under Swiss law. It also held that the secret surveillance ordered had interfered with the applicant's private life, even though it had been carried out in public places, since the investigators had collected and stored data in a systematic way and had used it for a specific purpose. Furthermore, the surveillance had not been prescribed by law, since provisions of Swiss law on which it had been based were insufficiently precise. In particular, they had failed to regulate with clarity when and for how long surveillance could be conducted, and how data obtained by surveillance should be stored and accessed. The Court further found that the use of the surveillance evidence in the applicant's case against her insurer had not made the proceedings unfair. In this respect it noted in particular that the applicant had been given a fair opportunity to challenge the evidence obtained by the surveillance, and that the Swiss court had given a reasoned decision as to why it should be admitted.

Exposure to health hazards

Judgment

[Otgon v. the Republic of Moldova](#), no. 22743/07, 25 October 2016

The case concerned the applicant's complaint about the amount of damages awarded to her by the courts after she drank infested tap water. As a result, she had spent two weeks in hospital with dysentery.

The Court found that there had been **a violation of Article 8** (right to respect for private and family life). Even though the domestic courts had established responsibility and awarded compensation in the proceedings brought against the State-owned local utilities provider, the Court considered that the sum awarded (equivalent to 310 EUR) was insufficient for the degree of harm that had been caused to the applicant's health.

Liability of health professionals

Judgment

[Vasileva v. Bulgaria](#), no. 23796/10, 17 March 2016

The case concerned the applicant's complaint about the lack of impartiality of medical experts in proceedings relating to her allegation of medical malpractice.

The Court found **no violation of Article 8** (right to private life) and **no violation of Article 6 § 1** (right to fair proceedings).

Grand Chamber hearing

[Lopes de Sousa Fernandes v. Portugal](#) no. 56080/13

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.

In its Chamber judgment of 15 December 2015, the Court held, by five votes to two, 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 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.

On 2 May 2016 the Grand Chamber Panel accepted the Portuguese Government's request that the case be referred to the Grand Chamber, which **held a hearing on 16 November 2016**.

Judgments

[Aydođdu v. Turkey](#), no 40448/06, 30 August 2016

The case concerned the allegation that the death of the applicant's daughter– who had been born prematurely and suffered from a respiratory disorder – had been caused by professional negligence on the part of the staff of the hospital where she had been treated. As the hospital where the applicants' daughter was born did not have a neonatal unit, she had been transferred to another hospital to receive vital emergency care, but owing to the lack of available space and equipment she had died two days after being born.

The Court held that there had been **a violation of Article 2** (right to life) under both its substantive and procedural heads. It found in particular that the baby had been the victim of a lack of coordination between health-care professionals, coupled with structural deficiencies in the hospital system, and that she had been denied access to appropriate emergency treatment, in breach of her right to protection of her life. The Court also found that the criminal proceedings had lacked the requisite effectiveness and that the response of the Turkish justice system to the baby's death had not afforded the safeguards inherent in the right to life, noting that as a result of inadequate

expert opinions the authorities had been unable to provide a coherent and scientifically grounded response to the problems arising and to establish any liability. Lastly, on the basis of Article 46 (binding force and execution of judgments) of the Convention, the Court called upon Turkey to take measures to require independent and impartial administrative and disciplinary investigations to be carried out within its legal system, affording victims an effective opportunity to take part; to ensure that bodies and/or specialists that could be called upon to produce expert opinions had qualifications and skills corresponding fully to the particularities of each case; and to require forensic medical experts to give proper reasons in support of their scientific opinions.

[Sayan v. Turkey](#), no. 81277/12, 11 October 2016

The case concerned the death of the applicants' partner/mother in a public hospital where she had been admitted for treatment while nine months pregnant.

The Court found that there had been **no violation of Article 2 as to the right to life**, but that there had been **a violation of Article 2 with regard to the related investigation**.

Prisoners' health-related rights

Judgments

[Karpylenko v. Ukraine](#), no. 15509/12, 11 February 2016

The applicant's son former detainee died of HIV-related illnesses in 2010 while in detention. In her application to the European Court the applicant complained under Article 2 of the Convention that the authorities had been responsible for her son's death as they had not provided him with adequate medical care in detention and that they had failed to conduct an effective investigation into his death. She further complained under Article 3 that her son had been ill-treated while in custody and that there had been no effective domestic investigation into that issue either.

The Court found violation of **Article 2** (right to life) under both its substantive and procedural limbs. It also found a violation **of Article 3**.

[Korneykova and Korneykov v. Ukraine](#), no. 56660/12, 24 March 2016

This case concerned a pregnant detainee, who alleged that she had been shackled in the maternity hospital where she had given birth and that she and her newborn son had subsequently been held in very poor conditions in a pre-trial detention centre, without adequate medical care.

The Court held, unanimously, that there had been: **four violations of Article 3** (prohibition of inhuman or degrading treatment).

The Court found in particular that shackling Ms Korneykova when she was suffering labour pains and immediately after her baby's delivery, as well as the cumulative effect – during the ensuing six months of her pre-trial detention – of her malnutrition as a breastfeeding mother, inadequate sanitary and hygiene arrangements for her and her

newborn son and insufficient outdoor walks had amounted to inhuman and degrading treatment.

[Topekhin v. Russia](#), no. 78774/13, 10 May 2016

The case concerned the conditions of detention and medical care of a paraplegic inmate.

The Court found **no violation of Article 3** (prohibition of inhuman and degrading treatment) on account of the quality of medical treatment provided to the applicant in detention; **a violation of Article 3** on account of the conditions of the applicant's detention in the remand prisons and a violation of Article 3 on account of the conditions of the applicant's transfer to the correctional colony

[Yunusova and Yunusov v. Azerbaijan](#), (no. 59620/14) 2 June 2016

This case concerned the allegation by the applicants, husband and wife and well-known human rights defenders and civil society activists, that their medical care in detention had been inadequate. Both had several serious medical problems prior to their arrest. Their diagnoses were immediately confirmed upon the applicants' admission to prison when they were examined by a doctor and underwent various medical tests. During the proceedings before the European Court, the couple had notably been granted their request – under Rule 39 (interim measures) of the Rules of Court – to be provided with adequate medical care in prison.

In this case the Court held that there had been **a violation of Article 34** (right of individual petition) and **a violation of Article 3** (prohibition of inhuman or degrading treatment) of the Convention. It found in particular that, despite monthly information reports having been provided about the couple's health and medical examinations following the issuing of the interim measure, the Azerbaijani Government had failed to submit medical evidence – such as medical prescriptions or doctors' recommendations – to back up their claim that the couple's health had been stable and had not required a transfer to a medical facility. Moreover, drawing inferences from the Government's failure to provide full information on the medical treatment provided to the couple, the Court concluded that they had not been provided with adequate medical treatment in detention. As a result of that inadequate medical treatment, the couple had been exposed to prolonged mental and physical suffering, amounting to inhuman and degrading treatment.

[Wenner v. Germany](#), no. 62303/13, 1 September 2016

The case concerned the complaint by a long-term heroin addict that he had been denied drug substitution therapy in prison.

The Court found **a violation of Article 3** (prohibition of inhuman or degrading treatment). The Court came to the conclusion that the authorities, despite their obligation to that effect, had failed to examine with the help of independent and specialist medical expert advice, against the background of a change in Mr Wenner's medical treatment, which therapy was to be considered appropriate.

[Kondrulin v. Russia](#), no. 12987/15, 20 September 2016

The case concerned a complaint brought by a prisoner about his inadequate medical care in detention; he then died from cancer while serving his sentence, leaving no known relatives, and the European Court had to consider the question of whether the NGO whose lawyers represented him in the domestic proceedings had legal standing to continue his case.

The Court found a violation of **Article 34** (right of individual petition) of the ECHR on account of the State's failure to comply with an interim measure in which the Court had requested an independent medical examination of the applicant, and **a violation of Article 3** (prohibition of inhuman or degrading treatment) on account of the authorities' failure to provide the applicant with the medical care he had needed. The Court found that, in the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, the applicant's lawyers, who had represented him in his proceedings against the domestic authorities and who had continued to do so even after his death without the authorities ever having expressed any objections, had legal standing to continue the application.

Detention and mental health

Judgments

[Petschulies v. Germany](#), no 6281/13, 2 June 2016

The case concerned the applicant's preventive detention in a residential facility affiliated to a psychiatric hospital, which had been retrospectively extended beyond the maximum period of ten years permissible at the time of his offences and conviction. The Court found **no violation of Article 5 § 1** (right to liberty and security).

[W.D. v. Belgium](#), no. 73548/13, 6 September 2016

The case concerned a sex offender suffering from mental disorders who was detained indefinitely in a prison psychiatric wing.

In its pilot judgment of 6 September 2016, the Court found violations of **Articles 3** (prohibition of inhuman or degrading treatment), **5 § 1** (right to liberty and security); **5 § 4** (right to speedy review of the lawfulness of detention) and **Article 13** (right to an effective remedy).

The Court found in particular that the applicant had been subjected to degrading treatment by having been detained in a prison environment for more than nine years, without appropriate treatment for his mental condition and with no prospect of reintegrating into society.

Furthermore, the Court held that the Belgian system, as in operation at the time of the events, had not provided the applicant with an effective remedy in practice in respect of his Convention complaints – in other words, a remedy capable of affording redress for the situation of which he was the victim and preventing the continuation of the alleged violations.

The Court found, lastly, that the applicant's situation had originated in a structural deficiency specific to the Belgian psychiatric detention system.

[Ruslan Markarov v. Russia](#), no. 19129/13, 11 October 2016

The applicant complained about his involuntary placement in a psychiatric facility.

Relying in particular on Article 5 § 1 (e) (right to liberty and security), he alleged that his mental health status had not justified involuntary hospitalisation and that it had therefore been unlawful, complaining also that the application for judicial authorisation of his hospitalisation had been submitted outside of the procedural time-limit of 48 hours.

The Court found that there had been **a violation of Article 5 § 1** (right to liberty and security)

[Hiller v. Austria](#), no 1967/14, 22 November 2016

The case concerned the suicide of the applicant's son, who had jumped in front of a subway train on 12 May 2010 after escaping from the psychiatric hospital where he had been placed. A few months earlier – in March 2010 – a court had ordered his placement on the psychiatric ward of the Otto Wagner Hospital in Vienna, a public institution, following an acute episode of paranoid schizophrenia. Shortly after his hospitalisation he had managed to escape twice from a closed ward. However, from the beginning of April 2010 he had voluntarily taken medicine and his condition had significantly improved. He had thus been transferred to an open ward where he was successively given more freedom, such as being allowed to take walks on his own in the hospital grounds. On 12 May he did not return from one of these authorised walks; the police informed the hospital later on in the day that he had jumped in front of a train and been killed.

The applicant subsequently brought civil proceedings against the City of Vienna as the authority responsible for the hospital, seeking compensation for the death of her son. She claimed in particular that her son should have been under stricter supervision and been prevented by the hospital staff from leaving the ward, given his unpredictable behaviour and the fact that he had already escaped twice before his death. Ultimately however the domestic courts dismissed the applicant's claim, concluding that the hospital, which had not recorded any signs of self-harm or suicidal thoughts throughout her son's stay in the institution, could not have foreseen her son's escape and subsequent suicide and was not therefore liable.

Moreover, the courts also noted that, given that his condition had been stabilised, restricting his liberty in a closed ward would have raised issues under both domestic law and the European Convention on Human Rights.

Relying on Article 2 (right to life) Ms Hiller alleged that the hospital authorities had failed in their duty to prevent her mentally-ill son from taking his life.

The Court found that there had been **no violation of Article 2** of the Convention. From the documents at hand and from the fact that the hospital kept a detailed record of his treatment, the Court was convinced that the hospital staff could not at any point have

had any reason to expect that the applicant's son would commit suicide. The Court therefore considered that the applicant's son's escape and subsequent suicide had not been foreseeable for the hospital and was not therefore attributable to it.

The Court also considered that today's paradigm in mental health care is "to give persons with mental disabilities the greatest possible personal freedom in order to facilitate their re-integration into society. The Court considers that from a Convention point of view, it is not only permissible to grant hospitalised persons the maximum freedom of movement but also desirable in order to preserve as much as possible their dignity and their right to self-determination. It also follows from the case-law on Article 5 of the Convention that a deprivation of liberty must be lifted immediately if the circumstances necessitating it cease to exist or change."

Pending case

[*Maria da Glória Fernandes de Oliveira v. Portugal*](#), no. 78103/14, communicated on 22 January 2016

Suffering from mental disorders and from alcohol and drug addiction, the applicant's son had been admitted several times to a psychiatric hospital. He made recurrent suicidal 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**.

Removal of Tissue

Pending case

[*Sablina and others v. Russia*](#), no. 4460/16, communicated on 21 September 2016

The applicants are the mother and the grandmothers of Ms A. S., who died in 2014 following a traffic accident. They complain under Article 8 of the Convention (right to respect for private and family life) that they were denied an opportunity to express their opinion on the extraction of organs from their relative's body.

The case was communicated to the Russian Government on 21 September 2016, reference being made to the case of [*Elberte v. Latvia*](#).

Reproductive rights

Home births

Grand Chamber Judgment

[*Dubská and Krejzová v. the Czech Republic*](#), nos. 28859/11 and 28473/12, 15 November 2016

The case concerned a law in the Czech Republic which made it impossible in practice for mothers to be assisted by a midwife during home births. The applicants, two women who wished to avoid unnecessary medical intervention in delivering their babies, complained that because of this law they had had no choice but to give birth in a hospital if they wished to be assisted by a midwife.

The Court found that there had been **no violation of Article 8** (right to respect for private and family life). It found, in particular that the national authorities had considerable room for manoeuvre when regulating the question of home births, a matter for which there is no European consensus and which involves complex issues of health-care policy as well as allocation of State resources. It concluded that the State's current policy struck a fair balance between, on the one hand, mothers' right to respect for their private life and, on the other, the State's interest in protecting the health and safety of the child and mother during and after delivery. Moreover, since 2014 the Government have taken some initiatives with a view to improving the situation in local maternity hospitals, notably by setting up a new governmental expert committee on obstetrics, midwifery and related women's rights. The Court invited the Czech authorities to make further progress by continuing their constant review of the relevant legal provisions on home births, making sure that they reflect medical and scientific developments whilst fully respecting women's rights in the field of reproductive rights.

Surrogacy

Judgment

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

The applicants are two French nationals and three children, who were born in India.

In both cases the applicants have been unable to obtain recognition under French law of their biological affiliation as established in India. The French authorities, suspecting recourse to unlawful gestational surrogacy agreements ("GPA"), are refusing to transcribe the birth certificates, which were issued in India. Relying on Article 8 (right to respect for private and family life), the applicants alleged a breach of their right to respect for their private and family life as a result of the refusal to transcribe the Indian birth certificates into the French civil-status registers on the grounds that Mr Foulon and Mr Bouvet had had recourse to a surrogacy agreement.

The Court found that there had **been no violation of Article 8 as concerns the applicants' right to respect for their family life; and that there had been a violation of Article 8 as concerns the right to respect for the children's private life.**

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