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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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based on the terms of the official documents published by the ECHR

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Recent case-law

Liability of health professionals

Grand Chamber Judgment

Lopes de Sousa Fernandes v. Portugal, no. 56080/13, 19 December 2017

This case concerned the death of the applicant's husband following nasal polyp surgery and the subsequent procedures opened for various instances of medical negligence. The applicant alleged that her husband's death had been caused by negligence and carelessness on the part of the medical staff, and that the authorities had not elucidated the precise cause of the deterioration in her husband's health.

The Grand Chamber held that there had been **no violation of the substantive limb of Article 2 (right to life)** of the Convention with regard to the applicant's husband's death. It considered in particular that the present case concerned allegations of medical negligence rather than denial of treatment. That being so, Portugal's obligations were limited to the setting-up of an adequate regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. Having regard to the detailed rules and standards laid down in the domestic law and practice of the Portuguese State in the area under consideration, the Grand Chamber found that the relevant regulatory framework did not disclose any shortcomings with regard to the State's obligation to protect the right to life of the applicant's husband. However, the Grand Chamber held that there had been a **violation of the procedural limb of Article 2**, finding that that the domestic system as a whole, when faced with an arguable complaint by the applicant of medical negligence resulting in the death of her husband, had failed to provide an adequate and timely response regarding the circumstances of the latter's death.

Judgments

Movsesyan v. Armenia, no. 27524/09, 16 February 2018

The case concerned the applicant's complaint that the investigation into the death of his daughter – allegedly as a result of medical negligence – had been inadequate.

The Court held that there had been **a violation of the procedural obligation under Article 2 (right to life)**, as the legal remedies available to the deceased's father were not capable of bringing about the result sought by Article 2 of the Convention, that is to say establishing the circumstances surrounding the death of his daughter and holding those responsible to account.

Mehmet Günay et Güllü Günay v. Turkey, no. 52797/08, 20 February 2018

The case concerned allegations of medical negligence in relation to the death of the applicants' daughter ten days after a hospital operation.

The Court found **a violation of Article 6 § 1 (right to a fair trial within a reasonable time)**. The Court found in particular that a period of some seven years and four months to adjudicate the applicants' claim for compensation did not satisfy the "reasonable length" requirement.
The Court **rejected the applicants' complaint under Article 2 (right to life)** on the grounds that it was manifestly ill-founded. It noted that the expert medical assessments and the conclusions of the domestic courts, which had been properly reasoned, had ruled out any medical error or negligence. It reiterated that it was not its task to question the findings of expert assessments.

İbrahim Keskin v. Turkey, no. 10491/12, 27 March 2018, Request for referral to the Grand Chamber pending
(Judgment available in French only)

The case concerned allegations of medical negligence committed by a hospital during the birth of a child, which left the child 60% disabled. The applicant brought criminal and civil proceedings but was unsuccessful.

The Court considered that there had been a **violation of Article 8 (right to respect for private and family life)** on the grounds that the applicant had not benefitted from an adequate judicial reaction respecting the requirements inherent in the protection of his daughter's right to physical integrity.

Eryiğit v. Turkey, no. 18356/11, 10 April 2018
(Judgment available in French only)

The case concerned an erroneous prenatal diagnosis. The applicant was taken to hospital, where the medical diagnostic established that she was expecting twins. This diagnosis was confirmed by doctors at another hospital following an ultrasound. On 8 November 1997, the applicant gave birth to one baby. The applicants lodged a criminal complaint for the disappearance of a newborn baby.
At the close of a criminal investigation the prosecutor discontinued the proceedings on the grounds that there had been an erroneous diagnosis and that there had never been a twin baby. The Supreme Administrative Council held that the applicant should be awarded damages in respect of the suffering caused by the absence of a second child as diagnosed. Administrative court proceedings ended on 20 July 2010.

The Court considered that there was no reason to put into question the conclusion drawn by the domestic authorities as to the absence of a twin pregnancy. With regard to the erroneous diagnosis, the Court observed that the domestic courts had acknowledged the responsibility of the administration and had granted damages. Accordingly, it declared this part of the application inadmissible.
However, the Court found a violation of the **procedural limb of Article 8 (right to respect for private and family life)**, on the ground of the excessive length of the proceedings before the administrative courts (almost 12 years).

Mehmet Hidayet Altun and Others v. Turkey, no. 48756/11, 14 November 2017 (Judgment available in French only)

The case concerned the death of the applicants' relative during his compulsory military service of complications related to epilepsy. According to an expert report commissioned by the military prosecutor, no negligence could be imputed to the doctors involved in the treatment or to the military authorities. The deceased's family lodged a claim for compensation with the High Military Administrative Court for the pecuniary and non-pecuniary damage sustained, but that claim was dismissed.

The Court considered that there had been **no violation of Article 2 (rights to life)**, but that there had been a violation of **Article 6 § 1 (right to a fair trial)**.

Admissibility decision

S.A. v. Turkey, no. 62299/09, 15 February 2018

The case concerned the applicant's claim that his son had sustained physical harm as a result of an allegedly botched circumcision. Taking the view that it was not appropriate to call into question the facts as established by the national authorities or the conclusions reached by them, the Court found that the domestic courts' decision to dismiss the applicant's claims had neither been arbitrary nor unreasonable and declared the complaint **inadmissible**.

Refund of medical expenses

Admissibility decision

Ján v. Hungary, no. 55021/15, 28 November 2017

The applicant, who is suffering from multiple sclerosis, complained about the domestic authorities' refusal to finance treatment received abroad.

The Court considered that it could not be said that the competent authorities of the respondent State exceeded the wide margin of appreciation afforded to them, notably in relation to the allocation of scarce resources and declared the application **inadmissible as being manifestly ill-founded**.

Protection of health related data

Mockutė v. Lithuania, no. 66490/09, 27 February 2018

The case concerned allegations by the applicant that a publicly run psychiatric hospital had revealed highly personal and sensitive, confidential information about her private life to journalists and to her mother, and that she had been prevented from practising her religion on account of a restrictive hospital environment and the unsympathetic approach of her doctors.

The Court held that there had been violations of **Articles 8 (right to respect for private life) and Article 9 (right to freedom of thought, conscience and religion).**The Court found that the hospital had unlawfully shared private information about the applicant, in contravention of domestic and international law, and had breached the applicant's freedom of religion by detaining her unlawfully and by pressurising her to "correct" her beliefs and practices.

Reproductive Rights

Judgment

Nedescu v. Romania, no. 70035/10, 16 January 2018

The applicants, a married couple, complain that they had not been able to recover embryos that had been seized by the prosecuting authorities in 2009 and that they had been prevented from having another child. The couple had won court orders in their favour to retrieve the embryos, but they had not been able to fulfil them.

The Court considered that the manner in which the judicial and administrative authorities involved implemented and interpreted the relevant legal provisions concerning the seizure, the storage following such a seizure and the return of the applicants' embryos was incoherent and thus lacked the required foreseeability and concluded that there had been **a violation of Article 8 (right to respect for private and family life)**.

Decision on Admissibility

Charron and Merle-Montet v. France, no. 22612/15, 8 February 2018

The applicants, a female married couple, complained that their request for medically assisted reproduction had been rejected on the grounds that French law did not authorise such medical provision for same-sex couples.

The Court declared the application **inadmissible**. It noted in particular that the Hospital's decision rejecting the applicants' request for access to medically assisted reproduction had been an individual administrative decision that could have been set aside on appeal for abuse of authority before the administrative courts. However, the applicants had not used that remedy. In the present case, noting the importance of the subsidiarity principle, the Court found that the applicants had failed to exhaust domestic remedies.

Surrogacy

Pending cases

C v. France, no. 1462/18
D v. France, no. 11288/18
Applications communicated to the French Government on 29 March 2018

Prisoners' health-related rights

Judgments

Ceesay v. Austria, 72126/14, 16 November 2017

The applicant's brother died in detention while on hunger strike. On the day of his death, he had been taken to hospital for examination and his fitness for detention had been confirmed. On his return at around 11 a.m. he was placed alone in a security cell, which did not contain a water outlet. A police officer checked on him every fifteen to thirty minutes. At 1.20 p.m. he was declared dead by an emergency doctor. The autopsy concluded that he had died of dehydration, combined with the fact that he had been a carrier of sickle cell trait, a fact of which he had been unaware.

The Court found that there had been **no violation of Articles 2 (right to life) and no violation of Article 3 (prohibition of inhuman or degrading treatment)**. As regards the steps to be taken in the event of a hunger strike, clear instructions had been issued by the Ministry of the Interior to the authorities, which had been prepared after consultations with its medical service and various NGOs. There was no indication that those instructions were in themselves insufficient or unclear, or that overall in the instant case they were not sufficiently followed. Furthermore there had been no indications that the applicant's brother suffered from sickle cell disease and he had not been aware of it himself. In the light of those facts and the witness and expert statements there was no reason to question the domestic courts' conclusion that the authorities could not have been aware that Y.C. was in a life-threatening situation requiring urgent medical attention. Further, the Court observed that while it was true that Y.C. could have requested a water bottle at any time, it would clearly have been advisable given the situation to provide him with direct access to water in the cell and to advise him to take in fluids. However, as it was not possible either for the hospital or the authorities at the detention centre to detect the critical state of the applicant's health and the fact that he might go into rapid decline due to the sickle cell disease, the failure to take such measures could not, under the circumstances, be considered as inhuman or degrading.

Dorneanu v. Romania, no. 55089/13, 28 November 2017

This case concerned the living conditions and care provided in prison to the applicant who was suffering from terminal metastatic prostate cancer. The applicant complained that his immobilisation in his hospital bed had amounted to inhuman treatment and that his state of health was incompatible with detention. He died after eight months in detention.

The Court held that there had been **a violation of Article 3 (prohibition of inhuman or degrading treatment)**, finding that the Romanian authorities' treatment of the applicant had not been compatible with the provisions of Article 3, and that they had subjected him to inhuman treatment while he was terminally ill. The Court noted in particular that the authorities had not taken into account the realities of the applicant's personal situation, and had not examined whether in practice he was fit to remain in detention. Accordingly, the decisions by the national authorities showed that the

procedures applied had prioritised formalities over humanitarian considerations, thus preventing the dying applicant from spending his final days in dignity.

Detention and mental health

Grand Chamber hearing

Fernandes de Oliveira v. Portugal, no. 78103/14, Grand Chamber hearing on 7 March 2018

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, which held a hearing on 7 March 2018.**

Referral to the Grand Chamber

Rooman v. Belgium, no. 18052/11, case referred to the Grand Chamber on 11 December 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 Chamber found a **violation of Article 3 (prohibition of inhuman or degrading treatment**). The Chamber 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. The Chamber held, however, that there had been **no violation of Article 5 § 1 (right to liberty and security)**. It pointed out, in particular, that there was still a link between the reason for the applicant's detention and his mental illness. The failure to provide appropriate care, for reasons unconnected with the actual nature of the institution in which the applicant had been held, had not broken that link and had not rendered his detention unlawful.

On 11 December 2017 the Grand Chamber Panel accepted the applicant's request that the case be **referred to the Grand Chamber.**

Judgments

N. v. Romania, no. 59152/08, 28 November 2017

The case concerned the detention of a person suffering from psychiatric disorders.
The Court found a violation of **Article 5 §** 1 (right to liberty and security) and § 4 (right to speedy review of the lawfulness of detention).
Under Article 46 (binding force and execution of judgments), the Court held, firstly, that the authorities should implement without delay a national judgment ordering the applicant's release in conditions meeting his needs; and secondly, that the deficiencies identified in his case were likely to give rise to other well-founded applications. It therefore recommended that the Romanian State **envisage general measures** to ensure that (1) the detention of individuals in psychiatric hospitals was lawful, justified and not arbitrary; and (2) any individuals detained in such institutions were entitled to take proceedings affording adequate safeguards with a view to securing a speedy court decision on the lawfulness of their detention.

Kadusic v. Switzerland, no. 43977/13, 9 January 2018

The case concerned an institutional therapeutic measure ordered in the case of a convicted prisoner suffering from a mental disorder, a few months before his expected release, as a result of which he remained in prison.

The Court held that there had **been a violation of Article 5 § 1 (right to liberty and security)**. The Court found that the therapeutic measure – which constituted a deprivation of liberty – had been ordered a few months before the applicant's expected release, on the basis of psychiatric reports that had not been sufficiently recent, and observed that the applicant had still not been transferred to an institution appropriate to his mental disorder. It followed that his detention following the application of the therapeutic measure had been incompatible with the purpose of the original conviction.

X v. Russia, no. 3150/15, 20 February 2018

The case concerned the applicant's compulsory confinement in a psychiatric facility.

The Court held that there had been **a violation of Article 5 § 1 (right to liberty and security)**. The Court found that the doctors and domestic courts had largely based their decision to place the applicant in hospital on an allegation that he had harassed a teenager. However, the authorities had never sought proper details of the allegation of harassment or examined whether there was enough evidence for it. They had also taken undue notice of the applicant's statement that he liked dressing up in women's clothing. Overall, the authorities had not shown that the applicant had presented a danger to himself or others or that his condition would have worsened if he had not been placed in hospital. The authorities had therefore failed to meet the test under the Court's case-law of the applicant's condition having been "of a kind or degree" warranting compulsory confinement.

Mockutė v. Lithuania, no. 66490/09, 27 February 2018

See above under "Protection of health-related data"

Admissibility decision

V.P. v. Estonia, no. 14185/14, decision of 10 October 2017

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 declared the complaint **inadmissible for non-exhaustion of domestic remedies**.

Pending case

Ciocoiu v. Romania, no. 46797/16, communicated on 20 January 2018

While serving a prison sentence for a road traffic offence, the applicant was diagnosed with a mental disorder. The applicant complains under Article 3 that he should have been placed in a psychiatric section of a prison hospital where he could have benefited from adequate treatment for his mental condition. He submits that his detention, without any access to psychiatric therapy, psychological counselling or adequate activities had a negative impact on his mental state and amounted to inhuman and degrading treatment. The applicant also complains that he was discriminated by the prison authorities due to his mental state of health.

The Court gave notice of the application to the Romanian Government and put questions to the parties **under Articles 3 (prohibition of inhuman or degrading treatment), 13 (right to an effective remedy) and 14 (prohibition of discrimination)**.

Death of an individual suffering from psychiatric disorders during a police intervention

Judgments

Boukrourou and Others v. France, no. 30059/15, 16 November 2017

The case concerned the death of an individual (M. B.) suffering from psychiatric disorders during a police operation.

The Court found that there had been **no violation of Article 2 (right to life)**, but that there had been **a violation of Article 3 (prohibition on inhuman or degrading treatment)**. The Court found in particular that the police officers had not used intrinsically lethal force against M.B. Furthermore, even if there was some kind of causal link between the force used by the police officers and M.B.'s death, the latter consequence had not been foreseeable in the present case: the police officers had not known that M.B. suffered from heart disease and could not have foreseen the danger incurred owing to the combination of two factors – stress and heart disease – liable to

present a risk to the victim. Finally, the police officers' rapid request for assistance and the swift arrival on the scene of the emergency services showed that the authorities had not failed in their obligation to protect M.B.'s life.
On the other hand, the Court held that the treatment inflicted on M.B – repeated and inefficacious violent acts against a vulnerable person – amounted to an infringement of human dignity and attained a severity threshold which rendered them incompatible with Article 3 of the Convention.

Frančiška Štefančič v. Slovenia , no. 58349/09, 24 October 2017

The case concerned the death of the applicant's son in the course of a police intervention intended to take him to a psychiatric hospital. According to the police report, the applicant's son refused to be taken to the psychiatric hospital. He became agitated and verbally aggressive. Eventually a medical technician injected him with an antipsychotic drug and, after he had been turned on his stomach, with another medication used to reduce the tremors caused by antipsychotic drugs. A few moments later, the officers and medical technicians noticed that he had vomited, which the doctor attributed to exertion. One medical technician then detected an irregular heartbeat. The medical team began to resuscitate him, but this was to no avail.

The Court held that there had been **a violation of Article 2 (right to life).** The Court observed, in particular, that the domestic investigations had not been capable of determining to a sufficient extent whether any of the persons involved in the incident might be held responsible for the death of the applicant's son. The Court further found that the conclusions made by the investigating authorities were inadequate, leaving open a number of questions which should have been examined in order to ensure that the investigation was effective.

Pending case

Chaâban and Abourabai v. Belgium, no. 57273/16, Application communicated to the Belgian Government on 29 May 2017

Statement of Facts available in French only

This case concerns in particular the death of a psychotic detainee at Forest Prison.
The Court gave notice of the application to the Belgian Government and put questions to the parties under **Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment) and 35 (admissibility criteria)** of the Convention.

Exposure to health hazards

Decision on the admissibility

Calancea and Others v. the Republic of Moldova, no. 23225/05, 1 March 2018

The case concerns the presence of a high-voltage power line crossing the applicants' land.
The Court held that the application was **manifestly ill-founded**. The Court considered, firstly, that it had not been demonstrated that the strength of the electromagnetic field from the high-voltage line had reached a level capable of having a damaging effect on the applicants' private and family sphere. Secondly, it found no appearance of a violation of the right to a fair hearing. Lastly, it observed that the applicants must have been aware of the presence of the high-voltage line when they had purchased the land and subsequently built their houses on it.

Removal of a seriously ill person

Khaksar v. the United Kingdom, no. 2654/18, 26 April 2018

The case concerned an Afghan asylum seeker's complaint about his threatened removal to Afghanistan. The applicant argued that his removal would breach Article 8 (right to respect for private and family life) and Article 3 (prohibition of inhuman or degrading treatment), in view of his serious health issues following a bomb blast in Afghanistan.
The Court declared the application inadmissible for **non-exhaustion of national remedies**. The Court pointed out in particular that the UK Court of Appeal had recently provided formally binding guidance to the lower courts on the removal of seriously ill people. The applicant, who had not sought permission for judicial review before the High Court of a decision by the Secretary of State refusing to reconsider his case, had therefore not given the domestic courts the possibility to consider his case in accordance with domestic law.

Female Genital mutilation

Pending case

Soumah v. the Netherlands and 4 other applications (nos. 61452/15, 7338/16, 66238/16, 37153/17, 63913/17), communicated on 15 December 2017

The applications concern female rejected asylum-seekers from Guinea who fear that their minor daughters will be subjected to female genital mutilation ("FGM") in Guinea and that they will not be able to provide protection given the high FGM rate in Guinea and within their ethnic groups as well as the social and cultural pressure. The third and fourth applicants also fear that they themselves will be subjected to further FGM if they are removed to Guinea.

The Court gave notice of the application to the Government of the Netherlands and put questions to the parties under **Article 3 (prohibition of inhuman or degrading treatment)** of the Convention.

Decision to discontinue artificial ventilation

Decisions on the admissibility

Afiri and Biddarri v. France , 1828/18, 23 January 2018

This case concerned the decision to withdraw the life-sustaining treatment being administered to a 14-year-old girl in a vegetative state following acute cardio-respiratory failure. The applicants, her parents, complained in particular of the fact that the decision to withdraw the treatment of their minor daughter ultimately lay with the doctor despite the fact that they opposed it. They argued that they should have a right of co-decision under the collective procedure, in their capacity as the parents and persons with parental responsibility.

The Court declared the application **inadmissible as being manifestly ill-founded**. It found in particular that the legislative framework in force **complied with Article 2 (right to life)** and that, despite the fact that the applicants disagreed with the outcome of the decision-making process undertaken by the doctors, the process had satisfied the requirements of that Article. The Court also found that French law had provided for a judicial remedy that satisfied the requirements of Article 2.

Evans v. the United Kingdom, no. 14238/18, 28 March 2018

The applicants are the parents of Alfie Evans, born on 9 May 2016, who has been on ventilation in hospital after becoming seriously ill with a catastrophic and untreatable, progressive, neurodegenerative condition.

The Court declared the application i**nadmissible**, finding that there was no appearance of a violation of the rights and freedoms set out in the European Convention on Human Rights. The Court has also rejected a request for an interim measure made by the applicants under Rule 39 of the Rules of Court to stay the order of the domestic courts permitting the withdrawal of Alfie Evans's treatment.

TV journalists' defamation conviction for programme criticising hospital's treatment of cancer patients

Judgment

Frisk and Jensen v. Denmark, 19657/12, 5 December 2017

The case concerned two Danish journalists working for a national television station and their conviction of defamation following a programme broadcast in 2008 criticising the treatment of cancer at Copenhagen University Hospital. The Danish courts concluded that their programme had undisputedly given viewers the impression that malpractice had occurred at the hospital.

The Court found that there had been **no violation of Article 10 (freedom of expression)**. The Court agreed with the Danish courts' decisions, finding that they had struck a fair balance between the journalists' right to freedom of expression and the hospital's and the consultant's right to protection of their reputation. In particular the Court saw no reason to call into question the domestic courts' conclusion that the programme had been factually incorrect. It also agreed that those wrongful

accusations, disseminated on primetime national television, had had considerable negative consequences, namely public mistrust in the chemotherapy used at the hospital.

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 2018)
- Health (April 2018)
- Reproductive rights (April 2018)
- Gestational Surrogacy (April 2018)
- Right to life (June 2013)
- End of life and the European Convention on Human Rights (January 2018)
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