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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 ECtHR

Contents

Recent case-law

Compulsory vaccinations:

Court's first judgment on compulsory childhood vaccination: No violation of the Convention

Grand Chamber hearing

Vavřička v. the Czech Republic, application no 47621/13, and five other applications
08 April 2021

In **Grand Chamber** judgment in the case of Vavřička and Others v. the Czech Republic (applications no. 47621/13 and five other applications) the European Court of Human Rights held, by a majority (sixteen votes to one), that there had been: **no violation of Article 8 (right to respect for private life)** of the European Convention on Human Rights.

In the Czech Republic there is a general legal duty to vaccinate children against nine diseases that are well known to medical science. Compliance with the duty cannot be physically enforced. Parents who fail to comply, without good reason, can be fined. Non-vaccinated children are not accepted in nursery schools (an exception is made for those who cannot be vaccinated for health reasons).

In the present case, the first applicant was fined for failure to comply with the vaccination duty in relation to his two children. The other applicants were all denied admission to nursery school for the same reason.

The Court pointed out that, under its case-law, compulsory vaccination, as an involuntary medical intervention, represents an interference with physical integrity and thus concerns the right to respect for private life, protected by Article 8 of the Convention.

It recognised that the Czech policy pursued the legitimate aims of protecting health as well as the rights of others, noting that vaccination protects both those who receive it and also those who cannot be vaccinated for medical reasons and are therefore reliant on herd immunity for protection against serious contagious diseases. It further considered that a wide "margin of appreciation" was appropriate for the respondent State in this context.

The Grand Chamber held a public hearing on 1 July 2020. The video recording of the Court's hearing is available on the ECtHR website.

Gestational Surrogacy

Pending application

S.C. and others v. Switzerland, no 26848/18, communicated to the Swiss Government on 15 June 2020
(statement of facts available in French only)

The applicants are a child born abroad through a gestational surrogacy arrangement, his parents of intent, and the woman who had given birth to him. The applicants complain about the Swiss authorities' refusal to inscribe the second applicant, who is not genetically related to the child, as a parent in the birth certificate.

Invoking **Article 8 (right to respect for private and family life)**, the applicants argue that the decision not to recognize the Californian judgment and birth certificate, with respect to the parental relationship between the parent of intent and the child, constitutes a disproportionate interference. The applicants also complain that an adoption procedure, instead of the recognition of the birth certificate, would not compensate for this infringement. In addition, the adoption procedure would have taken too long to be considered a rapid and effective parentage-building procedure.

The applicants also avail themselves of **Article 14** of the Convention, combined with **Article 8**, arguing that the child suffered discriminatory treatment because of his birth, as the refusal to recognize his birth certificate was based on his conception by surrogacy.

Judgment

Valdís Fjölnisdóttir and Others v. Iceland (no. 71552/17), 18 May 2021

Non-recognition of parental link with non-biological child born abroad via surrogacy, while preserving bond through foster care:"family life" applicable ; no violation.

The first and second applicants, a same sex couple, are the intended parents of the third applicant, a child born by way of gestational surrogacy in the United States and having no biological link with them. The Icelandic authorities initially refused to register the child in the national register and took legal custody of him, before placing him in the foster care of the first two applicants. After the entry into force of new legislation, the third applicant was added to the national register, but the first two applicants were not registered as his parents. The applicants appealed unsuccessfully.

The Court concluded that the non-recognition of a formal parental link, confirmed by the judgment of the Supreme Court, had struck a fair balance between the applicants' right to respect for family life and the general interests which the State had sought to protect by the ban on surrogacy. The State had thus acted within the margin of appreciation afforded to it in such matters.

The Court also found, unanimously, that there had been no violation of the applicants' right to respect for private life under **Article 8**, as the applicants' arguments were in principle the same as those submitted in relation to their complaint concerning "family life" and the Court saw no reason to reach a different conclusion.

End of life

Decision

Parfitt v. the United Kingdom (application no. 18533/21), 21 April 2021

In its decision in the case of the European Court of Human Rights has unanimously declared inadmissible the application, which concerns the withdrawal of treatment from a five-year old in a permanent vegetative state, and discontinues interim measure.

The applicant's five-year old daughter suffers from Acute Necrotising Encephalopathy and is in a permanent vegetative state with no prospect of improvement. On 8 January 2021 the High Court made a declaration to the effect that it would not be unlawful for the hospital caring for the applicant's daughter to withdraw treatment. On 19 March 2021 the Court of Appeal dismissed an appeal, considering that the judge had taken a decision that was in the child's best interests. On 1 April 2021 the Supreme Court refused permission to appeal.

Relying on **Article 2 (right to life) and Article 8 (right to respect for private and family life)**, the applicant complained that the withdrawal of life-sustaining treatment would violate her daughter's rights and that the domestic courts had insufficient regard to the family life of mother and child.

The applicant's complaints were declared inadmissible. The decision is final.

The decision is available only in English.

Detention and mental health/measures of restraint

Judgment

D.C. v. Belgium (application no. 82087/17), 30 March 2021

The applicant, D.C., is a Belgian national who was born in 1987. At the time the application was lodged he was being detained in Leuven Prison.

The case concerned the lawfulness of the applicant's placement in compulsory confinement, and alleged shortcomings in the proceedings leading to his placement. In particular, D.C. alleged that his detention, ordered by the investigating judicial authorities, had been unlawful as it had been based on a report produced by a psychiatrist who had never met him and a psychological report written over a year and a half previously. He also complained of the refusal of the investigating judicial authorities to call certain witnesses and experts and the fact that the hearings had not been conducted in public, and alleged that the Indictment Division had lacked impartiality.

In August 2015 D.C. attacked an individual with a knife and was arrested by the police the same day. The following day he was charged with attempted murder and detained in Lantin Prison. In September 2015 a psychologist issued a diagnosis of paranoid schizophrenia, taking the view that the applicant posed a danger to himself and to society. In June 2016 the Committals Division ordered his compulsory confinement. The Indictment Division upheld that decision in February 2017. An appeal on points of law by the applicant was dismissed in May 2017. The Social Protection Division ordered the applicant's release for a trial period as of 22 March 2018 with a view to his admission to a psychiatric hospital.

D.C. relied in particular on **Articles 5 §§ 1 and 4 (right to liberty and security/right to a speedy decision on the lawfulness of detention)** of the European Convention on Human Rights.

No violation of Article 5 § 1
No violation of Article 5 § 4

Venken v. Belgium (nos. 46130/14, 76251/14, 42969/16, 45455/17, and 236/19) 06 April 2021[1]

Compulsory confinement of mentally-ill offenders for a significant period in the psychiatric wing of a prison without hope of change and without appropriate medical support: **violation.**

The five applications concern the compulsory confinement of five Belgian applicants in the psychiatric wings of ordinary prisons. The applicants allege that they have not received therapeutic care that is appropriate to their mental-health condition and complain of the lack of an effective remedy in order to challenge this situation. These applications follow on from the pilot judgment W.D. v. Belgium (no. 73548/13, 6 September 2016).

The five applicants are offenders who were found to lack criminal responsibility for their actions and regarding whom compulsory confinement orders were imposed on different dates between 1992 and 2011, in application of sections 1 and 7 of the Social Protection Act of 9 April 1930 in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences,

[1] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

as amended by the Law of 1 July 1964 ("the Social Protection Act"). Those compulsory confinement measures were imposed on each occasion in order, firstly, to protect society, and secondly, to provide appropriate therapeutic support to such detainees with a view to their reintegration into society.

Relying on **Article 3 (prohibition of inhuman or degrading treatment)** and **Article 5 § 1 (right to liberty and security)**, the applicants complain about the fact that they have been detained for several years in the psychiatric wings of ordinary prisons, and submit that they have not received appropriate care and treatment for their mental-health conditions.

Relying on **Article 5 § 4 (right to a speedy decision on the lawfulness of detention), and Article 13 (right to an effective remedy) and Article 3 (prohibition of inhuman or degrading treatment)**, they consider that they did not have an effective remedy to bring about a change in their situation.

Strøbye and Rosenlind v. Denmark (applications nos. 25802/18 and 27338/18)
02 February 2021[2]

The case concerns the disenfranchisement of the applicants as a result of their having had their legal capacity removed on grounds of mental disability.

They instituted proceedings against the Danish interior ministry, arguing that they had been denied the right to vote in the 2015 parliamentary elections. The High Court of Eastern Denmark dismissed the claims, finding that removing the right to vote from individuals that had been deprived of their legal capacity was consistent with the legislation over many years and legal commentary, and that Denmark's international obligations did not affect that. The Supreme Court confirmed that decision, noting that the right to vote was not absolute. A public debate ensued, culminating in legislative amendments aimed at restoring voting rights to some individuals who had lost them, without abolishing entirely the removal of legal capacity.
On 20 May 2019 and 9 November 2019 respectively the applicants regained the right to vote in general elections.

Relying on **Article 3 of Protocol No. 1 (right to free elections)** to the European Convention on Human Rights, and **Article 14 (prohibition of discrimination)** of the Convention, the applicants complain that they were illegally disenfranchised.

The Court concluded that the restriction on the applicants' voting rights had been proportionate to the aim sought to be achieved (**No violation**). The Court also held, unanimously, that there had been **no violation of Article 14 taken in conjunction Article 3 of Protocol No. 1** as, referring to its reasoning in its examination of the latter provision, it was satisfied that the difference in the treatment of the applicants had pursued a legitimate aim and that there had been a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Request for referral to the Grand Chamber pending.

[2] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Caamaño Valle v. Spain (no. 43564/17), 11 May 2021

The case concerned the disenfranchisement of the applicant's daughter, M., who was mentally disabled.

Relying on **Article 3 of Protocol No. 1 (right to free elections)** to the Convention, read alone or in conjunction with **Article 14 (prohibition of discrimination), and Article 1 of Protocol No. 12 (general prohibition of discrimination)**, the applicant complains that the restrictions on her daughter's right to vote infringed her rights and were discriminatory.

The European Court of Human Rights held, by 6 votes to 1, that there had been **no violation of Article 3 of Protocol No. 1 (right to free elections)** to the European Convention on Human Rights**, and no violation of Article 14 (prohibition of discrimination) read in conjunction with Article 3 of Protocol No. 1 or of Article 1 of Protocol No. 12 (general prohibition of discrimination).**

The Court found in particular that "ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs" was a legitimate aim that had informed the domestic courts' judgments in respect of M. It found that the disenfranchisement decision had been individualised and proportionate to that aim. And it found that her disenfranchisement did not thwart "the free expression of the opinion of the people".

The Court found that the domestic authorities had taken into account M.'s special status and had not discriminated against her.

Denis and Irvine v. Belgium, 01 June 2021

The compulsory confinement of individuals who were detained prior to a 2016 legislative amendment and whose mental disorders persisted after that date is lawful.

The case concerned two applicants who had been placed in compulsory confinement on the basis of the Social Protection Act of 9 April 1930 after having committed acts classified as theft (Mr Denis, in 2007) and attempted theft (Mr Irvine, in 2002).

The Court noted that the applicants' deprivation of liberty related to the detention of "persons of unsound mind" and fell within the scope of Article 5 § 1 (e) of the Convention. It specified that this provision required that it had been reliably established that the individual in question was of unsound mind (1st condition), that the disorder was of a kind or degree warranting compulsory confinement (2nd condition) and that the disorder persisted throughout the entire period of the confinement (3rd condition). Thus, the Convention did not require the authorities, when assessing the persistence of the mental disorders, to take into account the nature of the acts committed by the individual which had given rise to his or her compulsory confinement.

The Court noted that it had been in the light of those considerations that the domestic courts had examined the applicants' requests for final discharge. They had not taken account of the nature of the punishable acts which the applicants had committed, but had examined whether the mental disorders had persisted, as required by Article 5 § 1 (e) of the Convention. They had found that there had still existed a high risk that the applicants would commit further violent crimes. In consequence, the Court held that the applicants' detention continued to have a valid legal basis and that their deprivation of liberty was lawful.

The Court also noted that the Compulsory Confinement Act laid down two cumulative conditions for the final discharge of an individual in compulsory confinement, and that neither of those conditions had been met in this case.

No violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, **and no violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention).**

Gender identity issues

Judgment

X and Y v. Romania (applications nos. 2145/16 and 20607/16), 19 January 2021

The authorities' refusal to legally recognise a change of gender identity in the absence of surgery breached the Convention: the European Court of Human Rights held, unanimously, that there had been **a violation of Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.

The case concerned the situation of two transgender persons whose requests for recognition of their gender identity and for the relevant administrative corrections to be made were refused on the grounds that persons making such requests had to furnish proof that they had undergone gender reassignment surgery.

The Court held that the domestic authorities' refusal to legally recognise the applicants' gender reassignment in the absence of surgery amounted to unjustified interference with their right to respect for their private life.

Pending application

L.B. c. France (case communicated) - 67839/17

Situation of an intersex person in the country of return: communicated

The case concerned the expulsion to Morocco, after the rejection of his asylum application, of an intersex person of Moroccan nationality who had undergone gender reassignment treatment in France. He submitted that the expulsion had effectively put an end to his medical gender reassignment treatment, since such treatment was not available in Morocco.

Furthermore, the applicant submits that he is regarded in Morocco as a homosexual person, with the risk of social rejection and criminal proceedings, exacerbated by his isolation and the fact that the associations for the defence of LGBTI persons are not officially recognised. He also complained, inter alia, of his inability to affirm his gender identity owing to the termination of his medical and surgical treatment.

Case communicated under **Articles 3 and 8 of the Convention**.

Y v. France, no 76888/17, communicated on 8 July 2020
statement of fact available in French only

Invoking **Article 8** (right to respect for private life), the applicant, who is an intersex person, requests to be marked in the birth certificate as "neutral" or "intersex" instead of "male".

Medical negligence

Judgment

Vilela and Others v. Portugal (application no. 63687/14), 23 February 2021

The applicants, Pedro Miguel Afonso Vilela, Benedito Alves Vileva and Maria dos Anjos Pereira Afonso, are Portuguese nationals who were born respectively in 1994, 1965 and 1966 and live in Vila Verde. The second and third applicants are the parents of the first applicant, who was born in 1994 and died on 6 April 2017.

The case concerns allegations of medical negligence during the hospitalisation of the third applicant, when she gave birth to the first applicant, who was born with a 100% degree of disability.

The applicants complained of a violation of **Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 6 § 1 (right to a fair hearing), 8 (right to respect for private and family life) and 14 (prohibition of discrimination)** of the European Convention on Human Rights and of **Article 1 of Protocol No. 1 (protection of property)** to the Convention.

No violation of Article 8 (substantive limb – medical treatment) in respect of Pedro Miguel Afonso Vilela. **Violation of Article 8** (procedure) in respect of Pedro Miguel Afonso Vilela.

The Court declared the other applicants' complaints inadmissible.

Available only in French

Scripnic v. Republic of Moldova (no. 63789/13), 13 April 2021

The case concerns an alleged case of medical negligence resulting in the death of a new-born child.

Relying in substance on Article 2 (right to life) and Article 6 (right to a fair hearing) of the European Convention, the applicants allege that they did not obtain appropriate relief in relation to their daughter's death, which they claim was caused by medical negligence. They also complain that the civil courts did not give sufficient reasons for their decisions.

Violation of Article 2 (procedure).

Available only in French

Freedom of expression

Pending application

De Pracomtal and Fondation Jérôme Lejeune v. France, nos. 34701/17 and 35133/17, communicated on 31 August 2020

Video promoting continuation of pregnancy following Down syndrome diagnosis excluded from television advertising slots.

As a follow-up to World Down Syndrome Day the applicant association arranged for an awareness-raising video entitled “Chère future maman” (“Dear Future Mom”) to be broadcast free of charge by three television channels. The video showed children and young adults with Down Syndrome, including the first applicant, evidently enjoying life.

In response to a number of complaints the national broadcasting authority (Conseil supérieur de l’audiovisuel – “the CSA”) wrote to the television channels concerned informing them that the video could not be broadcast during advertising breaks. The CSA explained that, under the regulations, free broadcasts such as those benefiting charitable organisations were not permitted, with the exception of “public interest” messages. The video in question, which took the form of a response to the fears of a pregnant woman who had received a pre-natal diagnosis of Down Syndrome, conveyed an ambiguous message which was the subject of debate and was liable to trouble the conscience of women who, while complying with the abortion legislation, had made different personal choices. The CSA considered that the message, in so far as it sought to combat the stigmatisation of persons with a disability, could have been conveyed successfully by being placed more fully in context within an appropriate setting, for instance as part of a television programme. An appeal against that decision was dismissed by the Conseil d’État.

The Court gave notice of the applications to the French Government and put questions to the parties under **Article 10** (freedom of expression) of the Convention.

Judgment

Gawlik v. Liechtenstein (no. 23922/19), 16 February 2021

The case concerned a doctor who raised suspicions that euthanasia had been taking place in his hospital. In doing so, he went outside the hospital complaints structure and lodged a criminal complaint. The affair attracted significant media attention.

The applicant had been employed as deputy chief physician at the Liechtenstein National Hospital. After conducting some research in the hospital’s electronic medical files, he concluded that his direct superior, Dr H, had illegally practised active euthanasia on some patients. The applicant lodged a criminal with the Public Prosecutors’ Office in that regard. After two external medical experts concluded that there had been no active euthanasia, the criminal proceedings against Dr H. were discontinued and the applicant was dismissed from his post without notice. He appealed unsuccessfully against his dismissal.

The applicant lodged a constitutional complaint, citing Article 10 of the Convention among other provisions. The Constitutional Court ruled that the right to freedom of expression applied in the relationship between the applicant and the Liechtenstein National Hospital. Although the court 3 accepted that the applicant regarded himself as a whistle-blower, it considered that he had not tested his suspicions before going public. The court dismissed the complaint.

Relying on **Article 10 (freedom of expression)**, the applicant complains that his dismissal without notice from his post for lodging a criminal complaint breached his rights.

The Court found in particular that although the applicant had not acted with improper motives, he had been negligent in not verifying information. His dismissal had thus been justified given the effect on the hospital's and another staff member's reputations. The Court concluded that the interference with the applicant's rights had been proportionate: **no violation**.

Prohibition of discrimination

Jurčić v. Croatia (no. 54711/15), 04 February 2021

The case concerns the denial to the applicant of employment health-insurance coverage during pregnancy. Unjustified, direct sex discrimination by refusing employment-related benefit to pregnant woman who underwent in vitro fertilisation shortly before employment: **violation (Article 14 in conjunction with Article 1 of Protocol No. 1).**

The applicant entered into an employment contract ten days after she had undergone in vitro fertilisation (IVF). When she subsequently went on sick leave, on account of pregnancy-related complications, the relevant domestic authority re-examined her health insurance status. It concluded that, by signing the contract shortly after IVF, the applicant had only sought to obtain pecuniary advantages related to employment status and that her employment was therefore fictitious. Her application to be registered as an insured employee, along with her request for salary compensation due to sick leave, was accordingly rejected. She appealed unsuccessfully.

A refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy amounted to direct discrimination on grounds of sex, which could not be justified by the financial interests of the State. The Court also noted a similar approach in the case-law of the Court of Justice of the European Union and in other relevant international standards. Accordingly, the difference in treatment to which the applicant, as a woman who had become pregnant through IVF, had been subjected, had not been objectively justified or necessary.

Restrictive measures in the context of the COVID-19 pandemic

Pending application

Communauté genevoise d'action syndicale (CGAS) v. Switzerland, no. 21881/20, communicated on 11 September 2020

This case concerns a ban on demonstrations in the context of the Covid-19 pandemic.

The Court gave notice of the application to the Swiss Government and put questions to the parties under **Article 11** (freedom of assembly and association) and **Article 35** (admissibility criteria) of the Convention.

Decision

Terhes v. Romania (no. 49933/20), 18 May 2021

The case concerns the lockdown which was ordered by the Romanian government from 24 March to 14 May 2020 to tackle the COVID-19 pandemic and which entailed restrictions on leaving one's home.

Relying on Article 5 § 1 (right to liberty and security), the applicant contends that the lockdown imposed in Romania from 24 March to 14 May 2020, with which he was required to comply, amounted to a deprivation of liberty.

The Court held that the measure complained of could not be equated with house arrest. The level of restrictions on the applicant's freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty. In the Court's view, the applicant could not therefore be said to have been deprived of his liberty within the meaning of Article 5 § 1 of the Convention.

In its decision the Court unanimously declared the application inadmissible. The decision is final.

Request for interpretation under Article 29 of the Convention on Human Rights and Biomedicine

Pending request

In December 2019, the European Court of Human Rights has received, for the first time, a request for an advisory opinion from the DH-BIO, with membership restricted to the parties of the Convention on Human Rights and Biomedicine, under Article 29 of that same convention. The questions posed by the DH-BIO are intended to obtain clarity on certain aspects of the legal interpretation of Article 7 of the Oviedo Convention, with a view to providing guidance for the DH-BIO's current and future work in this area.

On 26 June 2020 the Grand Chamber of the Court invited the Contracting Parties to the European Convention on Human Rights to submit written comments on the request, in light of a number of questions formulated by the Court.

The European Convention and its Protocols:

Italy ratifies Protocol No. 15 to the Convention, triggering its entry into force in respect of all Council of Europe member States with effect from 1 August 2021

Protocol No. 15 adds to the Preamble to the Convention and amends several of its provisions. Among other amendments, it reduces from six to four months the time-limit within which an application may be made to the Court following a final domestic decision.

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 (March 2021)
- Health (May 2021)
- Reproductive rights (February 2021)
- Gestational Surrogacy (May 2021)
- End of life and the European Convention on Human Rights (April 2021)
- Prisoners' health-related rights (July 2020)
- Detention and mental health (July 2020)
- Persons with disabilities and the European Convention on Human Rights (May 2021)
- Children's rights (May 2021)
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