COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 2 June 2023 CDBIO/INF(2023)7

STEERING COMMITTEE

FOR HUMAN RIGHTS IN THE FIELDS OF BIOMEDECINE AND HEALTH (CDBIO)

Developments in the field of bioethics

in the case law of the European Court of Human Rights (ECHR)

Document prepared by the Secretariat

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

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Recent case-law

Informed consent

Judgement

Mayboroda v. Ukraine (Application no. 14709/07), 13 April 2023

The case concerned[1] the applicant's allegation that her kidney had been removed without her consent or even knowledge during emergency surgery for internal bleeding in March 2000. The intervention had been carried out in the Lviv Regional Clinical Hospital, a public hospital. She had found out a few months later via an anonymous telephone call that her left kidney "had been stolen". An official investigation had concluded that the kidney had been removed to save her life, while a civil action she had brought had resulted in her being awarded damages against the consulting doctor.

Relying on **Article 8** (right to respect for private life), Ms Mayboroda complained of a failure to protect her right to informed consent about the removal of her kidney and of the doctors' concealing this information from her in the post-operative period.

The Court found in particular that the authorities had not examined whether there had been a possibility to gain consent to the kidney removal either from Ms Mayboroda before the operation or from her relatives during the procedure and the State had failed to set up an appropriate regulatory framework to protect Ms Mayboroda's right to informed consent.

The Court concluded unanimously that there had been a **violation of Article 8.**

The judgment is available only in English.

[1] Failure to protect a patient's right to informed consent, press release issued by the Registrar of the Court, 13.04.2023

Medical care and treatment access in prison

Judgement

Machina v. The Republic of Moldova (Application no. 69086/14), 17 January 2023

The applicant, Tatiana Machina, is a Moldovan national who was born in 1985 and lives in Chișinău. Since receiving an injury to her spinal cord in 2003, she has suffered from spastic paraplegia muscle weakness and stiffness affecting the lower limbs.
The case concerns[2] her medical care while serving a custodial sentence from February 2011 to July 2016, during which she was also diagnosed as having contracted the hepatitis C virus. It also concerns the various and essentially fruitless complaints she made to the authorities, seeking an order for the conditions of her detention to be improved and an acknowledgement that her rights were being violated.

Relying on **Article 3** (prohibition of inhuman or degrading treatment) of the European Convention, the applicant complains that she received inadequate medical care whilst in prison. She also complains of the absence of an effective remedy under Article 13.

Violation of Article 3 with regard to the State's failure to prevent the transmission of HCV in prison

Violation of Article 3 with regard to the absence of necessary medical care in prison

Violation of Article 13 in respect of the complaint concerning medical care in prison

Authorities' unreasonable delay in screening prisoner for hepatitis C and failure to investigate her complaints concerning infection while in prison; inadequate medical supervision: *violation*

The judgment is available only in English.

Forced abortion

Judgement

G.M. and Others v. the Republic of Moldova (Application no 44394/15), 22 November 2022

The case concerned[3] the imposition of abortions and birth-control measures on three intellectually disabled women, residents in a neuropsychiatric asylum, after they had

[2] Judgments of 17 January 2023, Press release
[3] Forced abortions and birth-control measures carried out on residents of a neuropsychiatric asylum - violation of Convention, Press release, 22.11.2022

been repeatedly raped by one of the head doctors there, and the investigation into their complaints.

The European Court of Human Rights held, unanimously, that there had been:

A violation of Article 3 – substantive aspect (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights as regards the inadequate legal protection of the physical integrity of women with intellectual disabilities, the forced abortions of the three applicants and the contraception imposed on the first applicant; and

A violation of Article 3 – procedural aspect (prohibition of inhuman or degrading treatment: obligation to conduct an effective investigation) as regards all three applicants.

The Court found in particular that the authorities had failed to carry out an effective investigation into the applicants' allegations of ill-treatment despite it having been reopened on four occasions following their appeals. The inquiry had not factored in their vulnerability as intellectually disabled women exposed to sexual abuse in an institutional context. It found that the domestic criminal law had not provided effective protection against such invasive medical interventions carried out without the patient's valid consent.

The judgment is available only in English.

Reproductive rights

Surrogacy and private life

Judgement

D.B. and Others v. Switzerland (Applications nos 58817/15 and 58252/15, 22 November 2022

The case concerned a same-sex couple who were registered partners and had entered into a gestational surrogacy contract in the United States under which the third applicant had been born. The applicants complained in particular that the Swiss authorities had refused to recognise the parent-child relationship established by a US court between the intended father (the first applicant) and the child born through surrogacy (the third applicant). The Swiss authorities had recognised the parent-child relationship between the genetic father (the second applicant) and the child.

The Court stated that the chief feature which distinguished the case from those it had decided before was that the first two applicants were a same-sex couple in a registered partnership. Regarding the third applicant, the Court noted that, at the time he was born, domestic law had afforded the applicants no possibility of recognition of the parent-child relationship between the intended parent (the first applicant) and the child. Adoption had been open to married couples only, to the exclusion of those in registered partnerships. Not until 1 January 2018 had it become possible to adopt the child of a registered partner. Thus, for nearly seven years and eight months, the applicants had had no possibility of securing definitive recognition of the parent-child relationship. The Court therefore held that for the Swiss authorities to withhold recognition of the lawfully issued foreign birth certificate in so far as it concerned the parent-child relationship between the intended father (the first applicant) and the child born through surrogacy in the United States, without providing for alternative means of recognising that relationship, had not been in the best interests of the child. In other words, the general and absolute impossibility, for a significant period of time, of obtaining recognition of the relationship between the child and the first applicant had amounted to a disproportionate interference with the third applicant's right to respect for private life under Article 8. Switzerland had therefore overstepped its margin of appreciation by not making timely legislative provision for such a possibility.

Regarding the first and second applicants, the Court first observed that the surrogacy arrangement which they had used to start a family had been contrary to Swiss public policy. It went on to hold that
the practical difficulties they might encounter in their family life in the absence of recognition under Swiss law of the relationship between the first and third applicants were within the limits of compliance with Article 8 of the Convention.

Then the court held:

- by a majority of six votes to one, that there had been a **violation of Article 8 (right to respect for private life of a child born through surrogacy)** of the European Convention on Human Rights, **and**

- unanimously, that there had been **no violation of Article 8 (right to respect for family life of the intended father and the genetic father)**.

The judgment is available only in French.

Judgement

K.K. and Others v. Denmark (Application no 25212/21), 6 December 2022

This case concerned the refusal to allow the first applicant to adopt the two other applicants, who were twins, as a "stepmother" in Denmark. The twins were born to a surrogate mother in Ukraine who had been paid for her service under a contract concluded with the first applicant and her partner, the biological father of the children. Under Danish law, adoption was not permitted in cases where payment had been made to the person who had to consent to the adoption.

The Court held that in the present case there had been **no violation of Article 8** (right to respect for family life) of the Convention, finding that there had been no damage to the family life of the applicants, who lived together with the children's father unproblematically. It also held that there had been **no violation of Article 8** (right to respect for private life) of the Convention as regards the mother's right to respect for her private life as the domestic authorities had been correct in ruling so, in order to protect the public interest in controlling paid surrogacy, over the first applicant's right to respect for private life. The Court held, however, that there had been a **violation of Article 8** as regards the right to respect for the private lives of the two applicant children, finding that the Danish authorities had failed to strike a balance between their interests and the societal interests in limiting the negative effects of commercial surrogacy, in particular as regards their legal situation and legal relationship to the first applicant.

The judgment is available only in English.

Ethics and assisted reproduction procedure

Judgement

Pejřilová v. Czech Republic (Application no 14889/19), 8 December 2022

The application concerned Ms Pejřilová, who after her husband died, was denied continuation of the assisted reproduction procedure she was undergoing with him

before. The applicant alleges a violation of her right to respect for her private life (Article 8 of the Convention).

The case concerns[4] the dismissal by the domestic courts of her request to use her late husband's cryopreserved sperm in an assisted reproduction procedure that they had initiated before his death, on account of the law only allowing assisted reproduction between living persons.

Relying on **Article 8** (right to respect for private and family life) of the European Convention on Human Rights, the applicant submits that the State should respect her choice of father for her child, as well as her late husband's wish to father a child with her and should allow her to continue the procedure using his frozen sperm.

The court concluded: **no violation of Article 8**. The domestic[5] rules were clear and had been brought to the attention of the applicant. The domestic courts had carefully examined her arguments but considered that the provisions of the SHS Act could not be disapplied. They had emphasised, *inter alia*, that in a situation where the applicant's husband had signed an informed consent form containing an explicit provision on the destruction of the cryopreserved sperm in the event of his death, the further consent from him which had been required by law could not be prejudged and replaced by a court's decision after he had passed away. The applicant's legitimate right to respect for the decision to have a child genetically related to her late husband should not be accorded greater weight than the legitimate general interests protected by the impugned legislation. This was all the more so that the Czech Republic had to be afforded a wide margin of appreciation in this respect, which it had not overstepped.

Conclusion: **no violation** (unanimously).

The judgment is available only in English.

Medical attention

Judgement

Hubert Nowak v. Poland (Application no 57916/16), 16 February 2023

The applicant, Hubert Nowak, is a Polish national who was born in 1986 and lives in Warsaw. The case concerns[6] a serious car accident that left Mr Nowak with brain damage and tetraplegic, and the allegedly inadequate first aid provided to him. He was

[4] https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7516609-10316852&filename=Judgments%20and%20decisions%2008.12.2022.pdf
[5] https://hudoc.echr.coe.int/fre?i=002-13929
[6] https://hudoc.echr.coe.int/eng?i=003-7572267-10408068

initially pronounced dead by an ambulance doctor and no medical attention was given to him for two hours.

Relying principally on **Article 2** (right to life), the applicant complains that the authorities failed both to protect his right to life and to carry out an effective and thorough investigation into his allegation of medical negligence.

No violation of Article 2 (right to life)
Violation of Article 2 (investigation)

Right to abortion

Judgement

B.B. v. Poland (Application no 67171/17), 18 October 2022

The case concerns a polish national who became pregnant at the end of 2013. In January 2014 she underwent a prenatal examination which did not show any foetal abnormalities. Eight weeks later, another examination showed that the foetus had many serious abnormalities. The doctor in charge informed her about the possibility to end pregnancy. Her wishes to have an abortion have not been respected by the Doctor citing the conscience clause. After several meetings with different doctors, she failed to obtain an abortion and her son was born with multiple defects before dying 9 days later.

She complained under Article 3 of the Convention that she had been subjected to inhuman and degrading treatment in that she had had to carry her pregnancy to term, to give birth, and to provide care to a severely, irreversibly, and fatally ill child, in spite of her wish to have an abortion. The applicant further complained that the facts of the case showed deficiencies in access to legal abortion as she had not been informed of another facility willing to carry out the procedure. The applicant submitted that the facts of the case also amounted to a breach of Article 8 of the Convention alone and taken in conjunction with Articles 13 and 14 of the Convention.

The court held unanimously the application **inadmissible** (article 34 and 35).

The judgment is available only in English.

Persons with disabilities and the European Convention

Judgement

T.H. v. Bulgaria (Application no. 46519/20), 11 April 2023

In 2012 the applicant, aged 8, who had behavioural difficulties, was diagnosed with a hyperkinetic disorder and a “specific developmental disorder of scholastic skills”. The case concerned his allegation that he had been discriminated against in his first two years of primary school by his teachers and head teacher on account of his disability. He interrupted his schooling there in the second term of his second year and completed his primary education in another mainstream school. The applicant submitted in particular that the staff in his first primary school had harassed him and treated him in the same way as pupils without a disability because they assumed that his behaviour was due to lack of proper parenting. He complained that, as a result, the school had failed to adapt his schooling to his special educational needs.

The Court held that there had been **no violation of Article 14** (prohibition of discrimination) of the Convention **taken in conjunction with Article 2** (right to education) **of Protocol No. 1** to the Convention in respect of the applicant. In particular, having examined the incidents one by one and chronologically, it noted that it could not be said, on the available evidence, that the actions of the head teacher or the applicant’s teacher had been unjustified, unreasonable or disproportionate. The Court also noted that it could not be said that the head teacher and the teacher had turned a blind eye to the applicant’s disability and his resulting special needs; it appeared that they had made a series of reasonable adjustments for him.

Berisha v. Switzerland (Application no 4723/13) 24 January 2023

In November 2010 the cantonal Compensation Office informed the applicant that the amounts he had claimed for the year 2010 exceeded the annual limit for reimbursement of illness and disability-related expenses, set at 90,000 Swiss francs (CHF). The remaining costs totalling CHF 1,146 were to be borne by the applicant. He was also informed that he could not claim reimbursement by the Compensation Office of any further expenditure incurred during the remainder of the year in question. The applicant appealed unsuccessfully against that decision.

Relying on Article 8 of the Convention, the applicant complained before the Court that the financial impact of the upper limit on reimbursement of illness and disability-related expenses for home care was such that he could be forced to move into a specialist residential facility. Noting that this upper limit did not apply to persons in residential care, he also alleged that he had been discriminated against, relying on Article 14 read in conjunction with Article 8.

Conclusion: **inadmissible** (incompatible *ratione materiae*).

The judgment is available only in French.

COVID-19

Decision on admissibility

Hafeez v. the United Kingdom (Application no14198/20), 28 March 2023

This case concerned inter alia the risk of life imprisonment without parole and inadequate conditions of detention due to the Covid-19 pandemic in case of the extradition to the United States of an sixty year old man with a number of health conditions, which include diabetes and asthma.

The Court declared the applicant's complaints under **Article 3** (prohibition of inhuman or degrading punishment or treatment) of the Convention **inadmissible**, as being manifestly ill-founded. In light of the recent developments, in particular the widespread availably of vaccinations, the evolution of the virus itself, and the lifting of restrictions in both the United Kingdom and the United States, it did not consider that any risk under this head capable of reaching the minimum level of severity required by Article 3 of the Convention had been established in the present case.

The judgment is available only in English.

Pending case

Communauté genevoise d'action syndicale (CGAS) v. Switzerland (Application no 21881/20)

15 March 2022 (Chamber judgment) – referred to the Grand Chamber in September 2022

The applicant association, which declared aim is to defend the interests of workers and of its member organisations, especially in the sphere of trade-union and democratic freedoms, complains of being deprived of the right to organise and participate in public events following the adoption of government measures to tackle Covid-19 under Ordinance "O.2 COVID-19", enacted by the Federal Council on 13 March 2020. On the basis of that ordinance, public and private events were prohibited with effect from 16 March 2020. Failure to comply with the prohibition was punishable by a custodial sentence or a fine. As of 30 May 2020 the ban on gatherings was relaxed (maximum of 30participants). Events involving more than 1,000 participants continued to be prohibited until the end of August 2020. On 20 June 2020 the ban on public events was lifted, although participants were required to wear a mask.

In its Chamber judgment of 15 March 2022 the Court held, by four votes to three, that there had been a **violation of Article 11** (freedom of assembly and association) of the Convention, finding that the respondent State had overstepped the margin of appreciation afforded to it in the present case and that the interference complained of had not been necessary in a democratic society within the meaning of the Convention.

The Chamber, while by no means disregarding the threat posed by Covid-19 to society and to public health, nevertheless considered, in the light of the importance of freedom of peaceful assembly in a democratic society, and in particular of the topics and values promoted by the applicant association under its constitution, the blanket nature and significant length of the ban on public events falling within the association's sphere of activities, and the nature and severity of the possible penalties, that the interference with the enjoyment of the rights protected by Article 11 had not been proportionate to the aims pursued. The Chamber also observed, in particular, that the domestic courtshad not conducted an effective review of the measures at issue during the relevant period.

On 5 September 2022 the Grand Chamber Panel accepted the Swiss Government's request that the case be referred to the Grand Chamber. On 12 April 2023 the Grand Chamber held a hearing in the case

Climate change and implications on health

Pending cases

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (Application no 53600/20)

This case, which has been brought by a Swiss association and its members, a group of older people concerned with the consequences of global warming on their living conditions and health, relates to a complaint of various failings of Swiss authorities in the area of climate protection. The applicants submit in particular that the respondent State has failed to fulfil its positive obligations to protect life effectively (Article 2 of the Convention) and to ensure respect for their private and family life, including their home (Article 8 of the Convention). They further complain that they have not had access to a court within the meaning of Article 6 (right to a fair trial) of the Convention, and of a violation of Article 13 (right to an effective remedy) of the Convention, arguing that no effective domestic remedy is available to them for the purpose of submitting their complaints under Articles 2 and 8.

The Chamber of the Court to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber on 26 April 2022.A large number of third-

party interveners, including member States, have taken part in the written stage of the proceedings.

On 29 March 2023 the Court held a **Grand Chamber hearing** in the case.

Carême v. France (no. 7189/21)

This case concerns a complaint by a resident and former mayor of the municipality of Grande-Synthe, who submits that France has taken insufficient steps to prevent climate change and that this failure entails a violation of the right to life (Article 2 of the Convention) and the right to respect for private and family life (Article 8 of the Convention).
The Chamber of the Court to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber on 31 May 2022.

On 29 March 2023 the Court held a **Grand Chamber hearing** in the case.

Humane Being and Others v. the United Kingdom (no. 36959/22)

1 December 2022 (inadmissibility decision)

The case was brought by a non-profit organisation running the “Scrap Factory Farming” campaign. The applicants complained, relying on Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life) of the Convention, that the United Kingdom had failed to regulate and take all reasonable steps to safeguard against the risks of factory farming.

The Court declared the application **inadmissible** (Article 34).