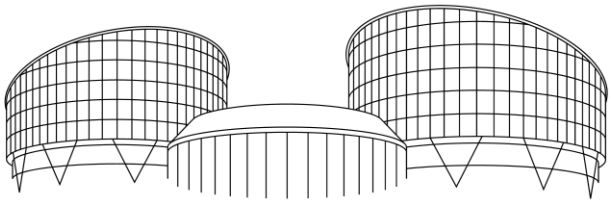

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

RESEARCH REPORT

Rights of persons in relation to involuntary placement and treatment in mental healthcare facilities

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

This report has been prepared by the Research Unit (in English only), under the supervision of the Directorate of the Jurisconsult, and does not bind the Court. The report was finalised on 16 December 2022.

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INTRODUCTION

1. This report provides an overview of the Court's case-law under Articles 3, 5 and 8 of the Convention related to mental health, in particular with regard to involuntary placement and involuntary treatment of persons with mental disorder in healthcare facilities.[1]

2. The report will first outline the case-law concerning involuntary placement in mental healthcare facilities under Article 5 § 1 of the Convention as well as concerning the involuntary examination of a person's mental health under Article 8 of the Convention.

3. Secondly, it will explore the case-law related to involuntary treatment in mental healthcare facilities. In this regard, the report will set out the key principles concerning the States' obligation to provide detainees with a mental disorder with adequate medical care under Article 3 of the Convention. The report will then focus on how the place and conditions of detention affect the lawfulness of detention under Article 5 § 1 of the Convention. This part of the report will also focus on the case-law developed under Articles 3 and 8 of the Convention in relation to involuntary treatment of persons within mental healthcare facilities.

4. Finally, it will briefly mention, some other issues related to private life which may be relevant in respect of rights of persons placed in healthcare facilities.

I. Involuntary placement in mental healthcare facilities

A. Involuntary placement in mental healthcare institutions with regard to Article 5 § 1 of the Convention

5. The Court has held on numerous occasions that any deprivation of liberty under Article 5 § 1 of the Convention must be "lawful" and "in accordance with a procedure prescribed by law". In addition to compliance with national law, Article 5 § 1 requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. This presupposes that both the order to deprive of liberty and the execution of the deprivation of liberty must genuinely conform with the

[1] For further information on the Court's case-law, see the relevant case-law guides on the ECHR-KS platform: Guide on Article 3, Guide on Article 5, Guide on Article 8 and the Guide on Prisoners' rights.

purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1. There must, in addition, be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of "detention".[2]

6. Although the "purpose" of "detention" is explicitly mentioned only in sub-paragraphs (c) and (d) of Article 5 § 1, the Court considered that this requirement is implicit in all the sub-paragraphs.[3]

7. As regards the deprivation of liberty of persons suffering from mental disorders in the context of Article 5 § 1 (e) of the Convention, the Court has held that an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: "firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends upon the persistence of such a disorder".[4]

8. The Court has stated that in deciding whether an individual should be deprived of liberty as a person of "unsound mind", the national authorities are to be recognised as having a certain discretion, since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities.[5] This said, deprivation of liberty of an individual is such a serious measure that it is only justified where other, less severe, measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be "detained".[6]

9. As regards the first condition for a person to be deprived of his liberty as being of "unsound mind", namely that "a true mental disorder must [have been] established before a competent authority on the basis of objective medical expertise", the Court reiterated that, despite the fact that the national authorities have a certain discretion, in particular on the merits of clinical diagnoses, the permissible grounds for deprivation of liberty listed

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[2] See *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67 and 69, ECHR 2008; and *Merabishvili v. Georgia* [GC], no. 72508/13, § 186, ECHR 2017 (extracts).
[3] See *Merabishvili*, cited above, § 299, *Rooman v. Belgium* [GC], no. 18052/11, § 190, 31 January 2019; and *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 131, 1 June 2021.
[4] See, among many other authorities, *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 127, 4 December 2018; *Rooman*, cited above, § 192; and *Denis and Irvine*, cited above, § 135.
[5] See *Denis and Irvine*, cited above, § 136.
[6] See *Ilnseher*, cited above, § 137; *Trutko v. Russia*, no. 40979/04, § 52, 6 December 2012.

in Article 5 § 1 are to be interpreted narrowly. A mental condition has to be of a certain severity in order to be considered as a "true" mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1, as it has to be so serious as to necessitate treatment in an institution for mental health patients.[7]

10. The Court has held that no deprivation of liberty of a person considered to be of "unsound mind" may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention.[8] According to the Court, the particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his or her violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases, a prior consultation is necessary. Where no other possibility exists, for instance owing to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of "unsound mind".[9]

11. As for the requirements to be met by an "objective medical expertise", the Court considers in general that the national authorities are better placed than itself to evaluate the qualifications of the medical expert in question.[10] However, in certain specific cases, it has considered it necessary for the medical experts in question to have a specific qualification. For example, where the person confined had no history of mental disorder, the Court has required that the initial medical assessment prior to ordering the deprivation of liberty should be carried out by a psychiatric expert.[11] Where there was a breakdown in the relationship of trust between the person confined and the staff of the institution in which he was placed, the Court has also required the medical assessment for continued deprivation of liberty to be made by an external medical expert.[12]

12. Moreover, the objectivity of the medical expertise entails a requirement that it was sufficiently recent. In a number of cases, the Court has emphasised that medical assessment must be based on the actual state of

[7] See *Ilnseher*, cited above, § 129; and *Denis and Irvine*, cited above, § 136.
[8] See *Kadusic v. Switzerland*, no. 43977/13, § 43, 9 January 2018, with further references.
[9] See *Varbanov v. Bulgaria*, no. 31365/96, § 47, ECHR 2000-X; *Constancia v. the Netherlands* (dec.), no. 73560/12, § 26, 3 March 2015; *Lorenz v. Austria*, no. 11537/11, § 57, 20 July 2017; and *D.C. v. Belgium*, no. 82087/17, §§ 87 and 99-100, 30 March 2021.
[10] See *Ilnseher*, cited above, § 130.
[11] *C.B. v. Romania*, no. 21207/03, § 56, 20 April 2010; *Ťupa v. the Czech Republic*, no. 39822/07, § 47, 26 May 2011; and *Vogt v. Switzerland* (dec.), no. 45553/06, § 36, 3 June 2014.
[12] *Ruiz Rivera v. Switzerland*, no. 8300/06, § 64, 18 February 2014.

mental health of the person concerned and that therefore a medical opinion could not be considered sufficient to justify deprivation of liberty if a significant period of time had elapsed. The question whether the medical expertise was sufficiently recent depends on the specific circumstances of the case before it.[13] For example, the Court has held that a medical expertise dating back from a year and a half could not in and of itself justify a person's deprivation of liberty for the purposes of Article 5 § 1 (e).[14]

13. As regards the second requirement for an individual to be deprived of his or her liberty as being of "unsound mind", namely that the mental disorder must be of a kind or degree warranting compulsory confinement, the Court has underlined that a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary because the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him from, for example, causing harm to himself or other persons.[15]

14. The Court has stated that the relevant time at which a person must be reliably established to be of "unsound mind", for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his or her liberty as a result of that condition. However, as shown by the third minimum condition for the detention of a person for being of unsound mind to be justified, namely that the validity of continued confinement must depend on the persistence of the mental disorder, changes, if any, to the mental condition of the detainee following the adoption of the detention order must be taken into account.[16]

15. The Court has considered that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to consider, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. Any protective measure, according to the Court, should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of

[13] Ibid., § 131; *Tim Henrik Bruun Hansen v. Denmark*, no. 51072/15, 9 July 2019; *D.C. v. Belgium*, cited above, § 86; *M.B. v. Poland*, no. 60157/15, 14 October 2021; *Miklić v. Croatia*, no. 41023/19, 7 April 2022.
[14] *Herz v. Germany*, no. 44672/98, § 50, 12 June 2003; *D.C. v. Belgium*, cited above, § 104.
[15] *Ilnseher*, cited above, § 133; see also *Stanev v. Bulgaria* [GC], no. 36760/06, § 146, ECHR 2012.
[16] See *Denis and Irvine*, cited above, § 137.

vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will, as a rule, require careful scrutiny.[17]

16. Furthermore, the Court has emphasised that it is primarily for the domestic courts to assess the scientific quality of different psychiatric opinions and, in that respect, they have a certain margin of appreciation. When the national courts have examined all aspects of different expert reports on the necessity of an individual's psychiatric internment, the Court will not intervene unless their findings are arbitrary or unscientific.[18]

17. Lastly, the Court has stressed that Article 5 § 1 (e) of the Convention does not specify the possible acts, punishable under criminal law, for which an individual may be detained as being of "unsound mind", nor does that provision identify the commission of a previous offence as a precondition for detention.[19] It allows compulsory confinement as a security measure, the purpose of which is preventive rather than punitive.[20]

B. Involuntary examination of a person's mental health under Article 8 of the Convention

18. The Court has held that the concept of private life includes a person's physical and psychological integrity and that mental health is a crucial part of private life.[21]

19. The Court has stated that the involuntary examination of a person by a psychiatrist from a State-run clinic or a hospital amounts to an interference with their right to respect for their private life.[22] Such interference will contravene Article 8 unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is "necessary in a democratic society" in order to achieve the aims pursued.

20. In *Fyodorov and Fyodorova*[23] which concerned the applicant's alleged unlawful psychiatric examination and diagnosis, the Court clarified that "in accordance with the law" refers, in particular, to a requirement of reasonable clarity concerning the scope and manner of exercise of discretion

[17] See *N. v. Romania*, no. 59152/08, § 146, 28 November 2017, and *Stanev*, cited above, § 153.
[18] *Ruiz Rivera*, cited above, § 62; *Hodžić v. Croatia*, no. 28932/14, § 63, 4 April 2019; and *P.W. v. Austria*, no. 10425/19, § 57, 21 June 2022.
[19] *Denis and Irvine*, cited above, § 168; *P.W. v. Austria*, cited above, § 58.
[20] *Denis and Irvine*, cited above, § 141; *P.W. v. Austria*, cited above, § 58.
[21] *Fyodorov and Fyodorova v. Ukraine*, no. 39229/03, § 82, 7 July 2011.
[22] *Matter v. Slovakia*, no. 31534/96, § 64, 5 July 1999, *Fyodorov and Fyodorova*, cited above, § 82, and *Pranjić-M-Lukić v. Bosnia and Herzegovina*, no. 4938/16, § 63, 2 June 2020.
[23] Cited above, §§ 83-87.

conferred on the public authorities. In that case it was not possible to establish the legal ground for the psychiatric examination, the Court therefore found that the examination had not been conducted in accordance with the law.

21. In *Pranjić-M-Lukić*[24], the Court found that the applicant's repeated forcible escort to involuntary psychiatric and psychological examinations during the criminal proceedings against him had not taken place "in accordance with the law" because the continuation of the said criminal proceedings had been unlawful.

22. The case of *Matter*[25] concerned the forcible examination of the applicant in a psychiatric hospital following his refusal to be examined by the expert who had been appointed to determine whether it was justified to continue to deprive the applicant of his legal capacity. The Court found no violation of Article 8 of the Convention. It considered that the impugned measure, which had been taken in accordance with the law, pursued the legitimate aim of protecting the applicant's own rights and health and that it was indeed appropriate for the domestic authorities to verify after a certain lapse of time whether the deprivation of the applicant's legal capacity continued to be justified.

II. Appropriate facilities for the detention of persons with mental disorders and their involuntary treatment

A. Medical care of persons with mental disorders deprived of liberty under Article 3 of the Convention

23. It has been clearly established in the Court's case-law that Article 3 of the Convention requires States to ensure that the health and well-being of persons deprived of their liberty are adequately secured by, among other things, providing them with the requisite medical assistance. A lack of appropriate medical care may thus amount to treatment contrary to Article 3 of the Convention.[26]

[24] Cited above, § 65.
[25] Cited above, §§ 65-71.
[26] See, among numerous authorities, *Rivière v. France*, no. 33834/03, § 74, 11 July 2006; *Raffray Taddei v. France*, no. 36435/07, § 51, 21 December 2010; and *Blokhin v. Russia* [GC], no. 47152/06, § 136, ECHR 2016.

24. In determining the "adequacy" of medical assistance, the Court takes into account several factors and decides on a case-by-case basis.[27]

25. In the case of prisoners with mental disorder, the Court has considered them to be particularly vulnerable[28]. Where the authorities decide to place and keep in detention a person with mental disorder, they should demonstrate special care in guaranteeing that the conditions of detention correspond to the person's special needs resulting from his or her disability. The same applies to persons who are placed involuntarily in psychiatric institutions.[29]

26. The assessment of whether the particular conditions of detention are compatible with the standards of Article 3 must take into consideration the vulnerability of those persons[30] and, in some cases, their inability to complain coherently or at all about how they are being affected by any particular treatment.[31] The Court has therefore emphasised that feeling of inferiority and powerlessness which is typical of persons suffering from a mental disorder calls for increased vigilance in reviewing whether the Convention has been complied with.[32]

27. The Court has considered that it is not enough for such detainees to be examined and a diagnosis made; it is essential that proper treatment and suitable medical supervision by qualified staff is also provided.[33] The mere fact that a detainee has been seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate. The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention, that diagnosis and care are prompt and accurate, and that where necessitated by the nature of a medical condition supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the

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[27] See *Blokhin*, cited above, §§ 137-138; *Bamouhammad v. Belgium*, no. 47687/13, §§ 1208123, 17 November 2015; and *Aleksanyan v. Russia*, no. 46468/06, §§ 137-140, 22 December 2008.

[28] *Renolde v. France*, no. 5608/05, § 84, ECHR 2008 (extracts).

[29] *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 113, 31 January 2019; and *Jeanty v. Belgium*, no. 82284/17, § 99, 31 March 2020.

[30] *M.S. v. Croatia (no. 2)*, no. 75450/12, § 96, 19 February 2015, and *Aggerholm v. Denmark*, no. 45439/18, § 81, 15 September 2020.

[31] See *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III, *Rooman*, cited above, § 145, with further references.

[32] See *Dybeku v. Albania*, no. 41153/06, § 47, 18 December 2007, *Sławomir Musiał v. Poland*, no. 28300/06, § 94, 20 January 2009, and *Gömi v. Turkey*, no. 38704/11, § 87, 19 February 2019.

[33] See *Murray v. the Netherlands* [GC], no. 10511/10, § 107, ECHR 2016; *Poghosyan v. Georgia*, no. 9870/07, § 49, 24 February 2009; *Bamouhammad*, cited above, § 122; and *Rooman*, cited above, § 146.

detainee's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis. The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through. Furthermore, medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole. Nevertheless, as the Court has reiterated many times, this does not mean that every detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities.[34] However, where the treatment cannot be provided in the place of detention, it must be possible to transfer the detainee to hospital or to a specialised unit.[35]

28. "Detaining" persons with mental disorders in establishments that are not suitable for their condition raises a serious issue under the Convention, in particular where no specialist treatment or medical supervision appropriate to their condition is available.[36] The Court has also noted the importance of appropriate treatment of persons with mental disorder in maintaining the prospect of their reintegration into society.[37]

29. Where the lack of adequate medical care has exceeded the threshold of severity under Article 3 of the Convention, the Court is not prepared to accept any excuses or justifications advanced by the respondent Government relating to a lack of resources. Respect for the dignity of persons deprived of liberty must be ensured regardless of financial or logistical difficulties[38], including maintenance works[39], a shortage of places in suitable facilities[40] or other such reasons.

30. The possibility for a patient to be treated by staff who speak his or her language, even where it is an official language of the State, is not an established ingredient of the right enshrined in Article 3, or in any other

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[34] See *Blokhin*, cited above, § 137; and *Rooman*, cited above, § 147. For further examples of the application of these principles, see *Strazimiri v. Albania*, no. 34602/16, §§ 108-109, 21 January 2020, *L.R. v. North Macedonia*, no. 38067/15, 23 January 2020, and *Sy v. Italy*, no. 11791/20, §§ 86-88, 24 January 2022.

[35] *Rooman*, cited above, § 148.

[36] See, for example, *Sławomir Musiał*, cited above, §§ 94 and 96; *Rivière*, cited above, § 75; and *G. v. France*, no. 27244/09, §§ 47-48, 23 February 2012.

[37] See *W.D. v. Belgium*, no. 73548/13, § 113, 6 September 2016, where the Court held:

> « … l'obligation découlant de la Convention ne s'arrête pas à celle de protéger la société contre les dangers que peuvent représenter les personnes délinquantes souffrant de troubles mentaux mais impose également de dispenser à ces personnes une thérapie adaptée visant à les aider à se réinsérer le mieux possible dans la société .»

[38] See *Dybeku*, cited above, § 50.

[39] See *Mamedova v. Russia*, no. 7064/05, § 63, 1 June 2006.

[40] See *Claes v. Belgium*, no. 43418/09, § 99, 10 January 2013.

Convention provision, particularly with regard to the provision of appropriate care to individuals who have been deprived of their liberty.[41]

31. The case of *Rooman*[42] concerned a German-speaking person's detention in a psychiatric facility situated in the French-speaking part of Belgium. The applicant alleged that he did not receive any treatment on the grounds that the institution in which he was detained did not employ any medical personnel who spoke German, one of the official languages in Belgium and the only language in which he could communicate with ease. Taking into account the language difficulties encountered by the medical authorities, the Court examined whether, in parallel with other factors, necessary and reasonable steps were taken to guarantee communication that would facilitate the effective administration of appropriate treatment. In the area of psychiatric treatment in relation to Article 3, the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment, but only where other factors do not make it possible to offset the lack of communication and, in particular, subject to cooperation by the individual concerned.[43]

32. Finally, in respect of the use of measures of physical restraint on patients in psychiatric hospitals, the Court held that the developments in contemporary legal standards on seclusion and other forms of coercive and non-consensual measures against patients with psychological or intellectual disabilities in hospitals and all other places of deprivation of liberty require that such measures be employed as a matter of last resort, when their application is the only means available to prevent immediate or imminent harm to the patient or others. It must also be shown that the coercive measure at issue was not prolonged beyond the period which was strictly necessary for that purpose.[44]

33. In this regard, the Court found a violation of Article 3 of the Convention where the Government had failed to demonstrate that the use of physical restraints on the applicant for fifteen hours, allegedly to prevent attacks and as a means to calm him down, had been necessary and proportionate.[45] The Court also found a violation of that provision in relation to a person's strapping to a restraint bed for almost twenty-three hours in a psychiatric hospital as this was not the only means available to prevent immediate or imminent harm to himself or others.[46]

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[41] *Rooman*, cited above, § 151.
[42] Cited above.
[43] See *Rooman*, cited above, § 151.
[44] *M.S. v. Croatia (no. 2)*, cited above, §§ 104-105, and *Aggerholm*, cited above, § 84.
[45] *M.S. v. Croatia (no. 2)*, cited above.
[46] *Aggerholm*, cited above.

B. Place and conditions of detention under Article 5 § 1 (e) of the Convention

34. According to the Court, the "lawfulness" of detention requires that that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will only be "lawful" for the purposes of Article 5 § 1 (e) if it takes place in a hospital, clinic or other appropriate institution authorised for that purpose.[47] Furthermore, the Court has had occasion to state that this rule applies even where the illness or condition is not curable or where the person concerned is not amenable to treatment.[48]

35. The Court has considered that administration of suitable therapy has become a requirement in the context of the wider concept of the "lawfulness" of the deprivation of liberty. Any detention of persons with mental disorder must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness. The Court has stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release.[49]

36. The Court has stated that the assessment of whether a specific facility is "appropriate" must include an examination of the specific conditions of detention prevailing in it, and particularly of the treatment provided to individuals suffering from psychological disorders.[50]

37. The Court has emphasised that deprivation of liberty contemplated by Article 5 § 1 (e) has a dual function: on the one hand, the social function of protection, and on the other, a therapeutic function that is related to the individual interest of the person of "unsound mind" in receiving an appropriate and individualised form of therapy or course of treatment. The need to ensure the first function should not, *a priori*, justify the absence of measures aimed at discharging the second. It follows that, under Article 5 § 1 (e), a decision refusing to release an individual from compulsory confinement may become incompatible with the initial objective of preventive detention contained in the conviction judgment if the person concerned is detained due to the risk that he or she may reoffend, but at the

[47] *Ilnseher*, cited above, § 138; *Rooman*, cited above, §§ 190 and 193; and *Stanev*, cited above, § 147.
[48] See *Rooman*, cited above, § 193.
[49] Ibid., § 208.
[50] Ibid., § 210.

same time is deprived of the measures - such as appropriate therapy - that are necessary in order to demonstrate that he or she is no longer dangerous.[51]

38. As to the scope of the treatment provided, the Court considers that the level of care required for this category of detainees must go beyond basic care. Mere access to health professionals, consultations and the provision of medication cannot suffice for a treatment to be considered appropriate and thus satisfactory under Article 5. However, the Court's role is not to analyse the content of the treatment that is offered and administered. It verifies whether an individualised programme has been put in place, taking account of the specific details of the detainee's mental health with a view to preparing him or her for possible future reintegration into society. In this area, the Court affords the authorities a certain latitude with regard both to the form and the content of the therapeutic care or of the medical programme in question.[52]

39. Hence, in a case where an applicant who was considered of "unsound mind" for the purposes of Article 5 § 1 (e) of the Convention was detained in an ordinary prison, the Court considered that the applicant had not been detained in an institution suitable for the detention of mental health patients. It therefore found a violation of Article 5 § 1 of the Convention.[53]

C. Involuntary treatment of persons with mental disorders

40. In the context of a child's surgical operations to remove a brain tumour, the Court has underlined the importance of patients' informed consent to medical treatment.[54] While the Convention does not establish any particular form of consent to medical treatment, the Court has held that where domestic law lays down certain express requirements, they should be complied with in order for the interference to be considered prescribed by law.[55]

(1) Cases examined under Article 3 of the Convention

41. The Court has held that it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health

[51] Ibid., § 210.
[52] Ibid., § 209.
[53] *W.A. v. Switzerland*, no. 38958/16, § 46, 2 November 2021. See also *Sy v. Italy*, no. 11791/20, §§ 133-137, 24 January 2022.
[54] *Reyes Jimenez v. Spain*, no. 57020/18, § 36, 8 March 2022.
[55] Ibid., a case in which the applicants had given verbal consent to a procedure but the law required written consent.

of patients who are entirely incapable of deciding for themselves, and for whom they are therefore responsible. The established principles of medicine are admittedly, in principle, decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court nevertheless examines whether the medical necessity has been convincingly shown to exist[56] and that procedural guarantees for the decision exist and are complied with[57].

42. In the case of *Gorobet*[58], the Court found no medical necessity to subject the applicant to forty-one days of confinement and forced psychiatric treatment in hospital and that such unlawful and arbitrary treatment had aroused in the applicant feelings of fear, anguish and inferiority amounting to degrading treatment.

43. Likewise, while the initial involuntary hospitalisation of the applicant was justified, the Court found, in the case of *Bataliny*[59], that no medical necessity had been shown for his continued involuntary hospitalisation and treatment, including his confinement and participation in scientific research for a new drug.

44. By contrast, in *Naumenko v. Ukraine*[60], the Court did not find evidence establishing beyond any reasonable doubt that the treatment given to the applicant in prison, even if forced, was contrary to Article 3, having regard, notably, to the fact that the applicant was suffering from serious mental disorders, had twice made attempts on his life and that he had been put on medication to relieve his symptoms.

45. The case of *G.M. and Others v. the Republic of Moldova*[61] concerned three women with intellectual disabilities living in psychiatric institutions but who had not been deprived of their legal capacity. They claimed to have been subjected to forced abortions and that, subsequently, intrauterine contraceptive devices were implanted without their consent to prevent further pregnancies. The Court notably found that the existing Moldovan legal framework lacked the safeguard of obtaining a valid, free and prior consent for medical interventions from persons with intellectual disabilities, adequate criminal legislation to dissuade the practice of non-consensual medical interventions carried out on persons with intellectual disabilities

[56] *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244; *M.S. v. Croatia (no. 2)*, cited above, § 98, and *Aggerholm*, cited above, § 83.
[57] See *Gorobet v. Moldova*, no. 30951/10, § 51, 11 October 2011; and *Bataliny v. Russia*, no. 10060/07, § 87, 23 July 2015.
[58] Cited above, § 52.
[59] Cited above, §§ 88-91.
[60] *Naumenko v. Ukraine*, no. 42023/98, §§ 113-116, 10 February 2004.
[61] *G.M. and Others v. the Republic of Moldova*, no. 44394/15, 22 November 2022. At the time of finalising the present report, this judgment was not yet final. It will become final in the circumstances set out in Article 44 § 2 of the Convention.

and other mechanisms to prevent such abuse of persons with intellectual disabilities. It therefore fell short of the requirement inherent in the State's positive obligation to establish and apply effectively a system providing protection to women living in psychiatric institutions against serious breaches of their integrity, contrary to Article 3 of the Convention. The Court further found a violation of Article 3 of the Convention in its substantive limb as regards the forced abortions in respect of all applicants, and concerning the forced contraception in respect of the first applicant.

(2) Cases examined under Article 8 of the Convention

46. With regard to the positive obligations that Member States have in respect of vulnerable individuals suffering from mental illness, the Court has affirmed that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.[62]

47. This said, as a person's body concerns the most intimate aspect of private life, the Court has stated that compulsory medical treatment, even if it is of minor importance, constitutes an interference with that person's right to physical integrity.[63] Similarly, according to the Court, imposing psychiatric treatment to a person without their consent constitutes an interference with their right to respect for private life.[64] Such interference will breach Article 8 of the Convention unless it is "in accordance with the law", pursues one of the legitimate aims set out in the second paragraph of that Article, and can be considered "necessary in a democratic society" in pursuit of that aim.

48. As to the first criterion of legality, the Court has held that the expression "in accordance with the law" not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects. Article 8 § 2 also requires the law in question to be "compatible with the rule of law". In the context of forced administration of medication, this means that domestic law must provide some protection for the individual against arbitrary interference with his or her rights under Article 8.[65] The Court indeed considered that the forced administration of medication represents a serious interference with a

[62] *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I.
[63] *X v. Finland*, no. 34806/04, § 212, ECHR 2012 (extracts), and *Atudorei v. Romania*, no. 50131/08, § 160, 16 September 2014; see also *Storck v. Germany*, no. 61603/00, § 143, ECHR 2005-V.
[64] *Shopov v. Bulgaria*, no. 11373/04, § 41, 2 September 2010.
[65] *X v. Finland*, cited above, § 217.

person's physical integrity, and must accordingly be based on a "law" that guarantees proper safeguards against arbitrariness.[66]

49. In *X v. Finland*[67] which concerned the applicant's involuntary admission to a mental institution, the Court found a violation of Article 8 of the Convention on the grounds that the applicant's forced administration of medication had been implemented without proper legal safeguards. In particular, the Court took into account the following elements: the decision to confine the applicant for involuntary treatment included an automatic authorisation to proceed to forcible administration of medication if the applicant refused the treatment; the decision-making was solely in the hands of the doctors treating the patient, who could take even quite radical measures regardless of the applicant's wishes; moreover, their decision-making was free from any kind of immediate judicial scrutiny: the applicant did not have any remedy available whereby she could require a court to rule on the lawfulness, including proportionality, of the forced administration of medication, or to have it discontinued.

50. In the case of *R.D. and I.M.D. v. Romania*[68] the applicants complained that they were forced to follow a medical treatment despite not suffering from any mental disorder. The Court concluded that the absence of sufficient safeguards against forced medication by doctors deprived the applicants of the minimum degree of protection to which they were entitled under the rule of law in a democratic society. The Court was notably concerned that domestic provisions did not provide a framework on how to obtain informed consent of persons with serious mental health problems who were placed under guardianship and how to proceed when these persons refused to undergo medical treatment.

51. In *Shopov* and in *Atudorei*[69], the applicants both complained that the treatment they had received during their hospitalisation without their consent had breached their right to respect for their private life. The Court found that the compulsory psychiatric treatment undergone by the applicants had indeed not been "in accordance with the law" on the grounds that the applicants had not consented to the medical treatment administered and the procedural safeguards provided for by law had not been respected.

52. The case of *Storck*[70] concerned the applicant's confinement in different private psychiatric hospitals and her forced medical treatment. The Court stated that the State remained under a duty to exercise supervision and control over private psychiatric institutions. In that case, the lack of

[66] Ibid., § 220.
[67] Cited above, § 220.
[68] *R.D. and I.M.D. v. Romania* [Committee], no. 35402/14, §§ 76-79, 12 October 2021.
[69] Both cited above.
[70] Cited above.

effective State control over private psychiatric institutions resulted in the respondent State's failure to comply with its positive obligation to protect the applicant. The Court therefore found a violation of Article 8 of the Convention.

III. Other issues under Article 8 in relation to persons involuntarily placed in mental healthcare facilities

A. Attending a relative's funeral

53. In *Solcan v. Romania*[71] which concerned the refusal to allow the applicant, detained in a psychiatric facility, to attend her mother's funeral, the Court held that the State can refuse an individual the right to attend his or her parents' funerals only if there are compelling reasons and if no alternative solution can be found. The State has a duty to assess each individual request on its merits and to demonstrate that the restriction on the individual's right to attend a relative's funeral is "necessary in a democratic society". The Court found a violation of Article 8 of the Convention in the case at stake because the applicant's request for leave had been refused on the sole ground that the domestic law did not provide for such a possibility, without any assessment of her individual situation.

B. Right to respect for correspondence

54. The case of *Herczegfalvy*[72] concerned a psychiatric hospital's practice of sending all the applicant's letters to his curator for him to select which ones to pass on to their addressees. Such practice constituted an interference with the applicant's right to respect for his correspondence. The Court found a violation of Article 8 of the Convention because the domestic law did not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society. In particular, the Court considered that the very vaguely worded provisions did not specify the scope or conditions of exercise of the discretionary power which was at the origin of the measures complained of. It underlined that such specifications appeared all the more necessary in the field of detention in psychiatric institutions in that the persons concerned are frequently at the mercy of the medical authorities, so that their correspondence is their only contact with the outside world.

[71] *Solcan v. Romania*, no. 32074/14, §§ 29-34, 8 October 2019.
[72] Cited above, § 91.