Strasbourg, 25 May 2022

CDBIO/INF (2022) 8

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

Contents

Recent case-law ... 3

Compulsory vaccinations: ... 3

Gestational Surrogacy and Assisted Reproduction Techniques ... 5

End of life ... 8

Detention and mental health/measures of restraint ... 9

Gender identity issues ... 13

Medical negligence ... 16

Freedom of expression ... 17

Prohibition of discrimination ... 18

Restrictive measures in the context of the COVID-19 pandemic ... 18

Climate change and implications on health ... 19

Request for interpretation under Article 29 of the Convention on Human Rights and Biomedicine ... 20

The European Convention and its Protocols: ... 21

Recent case-law

Compulsory vaccinations:

Refusal of requests for interim measures in respect of the Greek law on compulsory vaccination of health-sector staff against Covid-19.

On 2 September 2021 the European Court of Human Rights received two applications against Greece, lodged by 30 health professionals who work independently or in public health institutions.

Under Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment), 4 (prohibition of slavery and forced labour), 5 (right to liberty and security), 6 (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, the applicants complain about the provisions of section 206 of Law no. 4820/2021 which impose compulsory vaccination of health-sector professionals against Covid-19 as a condition for being able to continue exercising their occupation.

The applicants also requested that the Court apply interim measures (Rule 39 of the Rules of Court) and that it suspend immediately the application of the law.

On 7 September 2021 the Court decided to reject the requests for interim measures, holding that they were outside the scope of Rule 39 (interim measures). The decision was taken by the duty judge responsible for interim measures.

The Court pointed out that measures under Rule 39 of the Rules of Court are decided in connection with proceedings before the Court, without prejudging any subsequent decisions on the admissibility or merits of the case. The Court grants such requests only on an exceptional basis, when the applicants would otherwise face a real risk of irreversible harm.

The applications are currently pending before the Court; they have been registered under the following numbers:

- Application no. 43375/21 (***Kakaletri and Others v. Greece***), lodged by 24 applicants, of whom 18 are independent doctors and six are employed in public medical institutions.
- Application no. 43910/21 (***Theofanopoulou and Others v. Greece***), lodged by six public-sector employees working in public medical institutions (doctors/a nurse/paramedic).

Notice of application before Court concerning compulsory vaccination of certain workers imposed by French law on health crisis

Thevenon v. France (application no. 46061/21)

The applicant, Pierrick Thevenon, is a French national who was born in 1988. The application was lodged with the European Court of Human Rights on 10 September 2021.

The case concerns the compulsory Covid vaccination imposed on Mr Thevenon, on account of his activity as a professional firefighter, on the basis of Law no. 2021-1040 of 5 August 2021 on the management of the health crisis.

Relying on Article 8 (right to respect for private and family life) of the Convention, taken separately and in combination with Article 14 (prohibition of discrimination), and Article 1 of Protocol No. 1 (protection of property), Mr Thevenon complains that he is subject to the occupation-based

compulsory vaccination under Law no. 2021-1040 of 5 August 2021 and also that his refusal to be vaccinated against Covid-19 has led, since 15 September 2021, to the suspension of his professional activity and the total stoppage of his salary.

The European Court of Human Rights has given notice to the Government of France of the application and has asked them to submit their observations on its admissibility and merits.

Gestational Surrogacy and Assisted Reproduction Techniques

Decision

S.-H. v. Poland (nos. 56846/15 and 56849/15), 9 December 2021

The applicants, S. and M. S.-H. are dual Israeli and United States nationals who were both born in 2010 and live in Ramat-Gan (Israel). The applicants' parents are a same-sex couple, who in 2010 had the children conceived via a surrogacy agreement. The applicants were confirmed as children of their parents by the Superior Court of California. The case concerned their application for Polish citizenship (one of their parents is a Polish national).

Relying on **Articles 8 (right to respect for private and family life)** and **14 (prohibition of discrimination)**, the complained of the refusal by the Polish authorities to recognise their relationship with their biological father, which they alleged had been because their parents were a same-sex couple.

The Court determined that the case had been seen in the light of the consequences of the Polish authorities' decisions. While it acknowledged that the applicants would not have Polish and European citizenship as a result of those decisions, it pointed out that they would still enjoy free movement in Europe. For the Court, they had not put forward any claims of hardship they had suffered as a result of the decisions, either before the Court or the domestic authorities. In particular, the parent-child link in this case, although not recognised by the Polish authorities, was recognised in the State where the applicants resided. Legal recognition in the United States had meant that the applicants had not been left in a legal vacuum both as to their citizenship and as to the recognition of the legal parent-child relationship with their biological father.

In its decision, the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final. The Court held that as the applicants had not suffered any hardship or been left in a legal vacuum as a result of the Polish authorities' decision, the application had to be rejected *ratione materiae*.

The decision is only available in English.

Judgment

A.M. v. Norway (no. 30254/18), 24 March 2022

The applicant, A.M., is a Norwegian national who was born in 1962 and lives in Oslo.

The case concerns complaints relating to proceedings between the applicant and her ex-partner, and proceedings against relevant administrative decisions in Norway, concerning parental rights in respect of a child, X, born by surrogacy in the United States of America.

Relying on **Article 8 (right to respect for private and family life)** and **Article 14 (prohibition of discrimination)** of the European Convention, the applicant complains about the domestic authorities' not having granted her contact rights in respect of X or recognising her as X's mother, either by acknowledging the birth certificate issued in the United States or by approving her requests for parenthood.

No violation of Article 8
No violation of Article 14 taken in conjunction with Article 8

The judgment is available only in English.

Judgment

A. L. v. France (application no. 13344/20), 7 April 2022

The case concerned the compatibility with the right to respect for private life (Article 8 of the Convention) of the domestic courts' refusal to legally establish the applicant's paternity vis-à-vis his biological son – who had been born in the framework of a gestational surrogacy contract in France – after the surrogate mother had entrusted the child to a third couple.

Relying on Article 8 (right to respect for private and family life), the applicant submitted that the dismissal of his application to establish his paternity in respect of his biological son, who had been born in France in the framework of a gestational surrogacy contract, amounted to a disproportionate interference with his right to respect for his private life, lacking any legal basis.

The Court noted that the Court of Appeal, backed up by the Court of Cassation, had duly prioritised the best interests of the child, which it had been careful to characterise in practical terms having regard to the biological reality of the paternity claimed by the applicant. In balancing the applicant's right to respect for his private life, on the one hand, with his son's right to respect for his private and family life, which required compliance with the principle of prioritising the child's best interests, the Court considered that the grounds set out by the domestic courts to justify the impugned interference had been relevant and sufficient for the purposes of Article 8 § 2 of the Convention.

Nevertheless, the Court noted that the proceedings had taken a total of six years and about one month, which was incompatible with the requisite duty of exceptional diligence. The child had been about four months old when the case had gone to court, and six-and-a-half years old when the domestic proceedings had ended. In cases involving a relationship between a person and his or her child, the lapse of a considerable amount of time could lead to the legal issue being determined on the basis of a fait accompli.

The Court concluded that there had been a violation of Article 8 of the Convention on account of the respondent State's failure to honour its duty of exceptional diligence.

The Court emphasised, however, that the finding of a violation should not be interpreted as questioning the Rouen Court of Appeal's assessment of the child's best interests or its decision to dismiss the applicant's requests, as upheld by the Court of Cassation.

Violation of Article 8 (right to respect for private and family life)

The judgment is available only in French.

Judgment

Lia v. Malta (no. 8709/20), 5 May 2022

The applicants, Gilbert Lia and Natasha Lia, are Maltese nationals who were born in 1980 and 1971 respectively and live in Attard (Malta). They are married.

The case concerns the authorities' refusal in 2015 to carry out, at the applicants' expense, Intracytoplasmic Sperm Injection – a procedure to assist procreation – on Ms Lia's ova owing to

her having reached the age of 43. They had previously availed of the procedure, paid for by the State, in 2014.

The applicants rely on **Article 8 (right to respect for private and family life)** alone and in conjunction with Article 14 (prohibition of discrimination) of the European Convention of Human Rights.

Violation of Article 8

The judgment is available only in English.

End of life

Judgment

Polat v. Austria (application no. 12886/16), 20 July 2021

The case concerned a post-mortem examination of the applicant's son carried out against her will.

The Court found in particular that the Austrian authorities had failed to balance the needs of science and the protection of public health against the applicant's rights in carrying out the post-mortem against her will and against her religious convictions, and examining the issue later in the courts. It also found that the failure to disclose to the applicant information regarding the extent of the examination given her specific circumstances had been a violation of her rights.

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)** and **Article 9 (freedom of thought, conscience and religion)** of the European Convention on Human in respect of the postmortem examination of the applicant's baby carried out against her will and against her religious convictions**, and a violation of Article 8** in respect of the authorities' failure to disclose information to the applicant about her son's post-mortem examination.

The judgement is only available in English.

Judgment

Lings v. Denmark (application no. 15136/20), 12 April 2022

The applicant is a doctor and the founder of a pro-assisted-suicide organisation, Physicians in Favour of Euthanasia. The case concerned his conviction on two counts of assisted suicide, and one count of attempted assisted suicide. He asserted that he had just been disseminating information about suicide.

Relying on **Article 10 (freedom of expression)** of the European Convention on Human Rights the applicant complained that the final domestic-court decision had breached his right to free expression.

The Court found in particular that the authorities had acted within their wide discretion in convicting Mr Lings. The relevant law criminalised specific acts of assisted suicide, which the applicant had been found guilty of, rather than general provision of information about suicide. The aims of the authorities – protection of health and morals and the rights of others – had been legitimate.

No violation of Article 10 (freedom of expression)

The judgment is available only in English.

Detention and mental health/measures of restraint

Committee Judgment

R.D. and I.M.D. v. Romania (application no. 35402/14), 12 October 2021

The applicants, Mr R.D. and Ms I.M.D., are Romanian nationals who were born in 1967 and 1982 respectively and live in Ştei The case concerned the applicants' non-voluntary confinement in a psychiatric hospital for the purpose of compelling them to undergo medical treatment, and the obligation to follow that treatment.

The Court noted that the relevant psychiatric forensic medical reports in respect of the applicants had been prepared on 4 October 2011, that is, more than three years before the measure ordering their placement in a psychiatric hospital. In the Court's opinion, the lack of a recent medical assessment was sufficient to conclude that the applicants' placement had not been lawful under the Convention. Additionally, the lack of detailed reasoning in the national court decisions ordering their confinement did not allow it to be established sufficiently that the applicants posed a risk to themselves or others, in particular because of their psychiatric condition.

The Court considered that although the contested measure had indeed had a legal basis in Romanian law, the absence of sufficient safeguards against forced medication had deprived the applicants of the minimum degree of protection to which they were entitled in a democratic society.

Relying on **Articles 5 § 1** (**right to liberty and security)** and **8 (right to respect for private and family life)**, the applicants complained about their compulsory confinement, which they considered to be unjustified and arbitrary. They also alleged that they had been compelled to undergo medical treatment since the beginning of their confinement.

The European Court of Human Rights held, unanimously, that there had been:
a **violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights, and
a **violation of Article 8 (right to respect for private life).**

The judgment is only available in French.

Judgment

M.B. v. Poland (application no. 60157/15), 14 October 2021

The applicant, Mr. M.B., is a Polish national who was born in 1985 and lives in Cracow (Poland). The case concerns the applicant's detention in a psychiatric hospital on the basis of an allegedly outdated medical assessment. After the applicant had attacked his parents with a knife the domestic courts applied a security measure and placed him in a psychiatric hospital.

Under **Article 5 § 1 (right to liberty and security)** of the European Convention, the applicant complains that his detention in a psychiatric hospital was unlawful in that it was not based on recent medical evidence. He submits that he was not reliably shown to have been "of unsound mind".

Violation of Article 5 § 1 (e) (as regards the applicant's hospitalisation between 4 August 2015 and 12 April 2016)

No violation of Article 5 § 1 (e) (as regards the applicant's hospitalisation between 12 April and 29 November 2016)

The judgment only is available in English.

Judgment

N. v. Romania (no. 2), (application no. 38048/18), 16 November 2021

The case concerned proceedings in which the domestic courts, basing their decisions mainly on medical expert opinions, divested the applicant of his legal capacity and placed him under the full authority of a legal guardian. It also concerned the manner in which the domestic authorities subsequently changed his legal guardian.

The applicant, N., is a Romanian national who was born in 1959 and lives in Bucharest.
From June 2006 until May 2018, he was detained in Săpoca Psychiatric Hospital (Romania).

The Court found in particular that the legal provisions meant that the applicant's actual needs and wishes could not be factored into the decision-making process and the measure divesting him of his legal capacity could not be tailored to suit his situation. As a result, his rights under Article 8 had been restricted by law more than was strictly necessary.

In addition, the Court considered that the decision-making process for the applicant's change of legal guardian had not been accompanied by adequate safeguards. N. had been excluded from the proceedings for the sole reason that he had been placed under guardianship. No consideration had been given to his capacity to understand the matter and express his preferences. Moreover, the reason for the change was insufficient and the decision was disproportionate.

As the shortcomings identified in this judgment were liable to give rise to further justified applications in the future, the Court held under Article 46 (binding force and execution of judgments) that the Romanian State had to adopt measures with a view to bringing its legislation and practice into line with the international standards, including the Court's case-law, in the matter.

This is the second judgment by the Court finding a violation of the applicant's rights. In its judgment N. v. Romania (no. 59152/08) of 28 November 2017, the Court held that N. should be released without delay and recommended general measures for safeguarding the rights of individuals detained in psychiatric hospitals.

The European Court of Human Rights held, unanimously, that there had been:
a **violation of Article 8 (right to respect for private life)** of the European Convention on Human Rights in respect of the applicant being divested of his legal capacity; and
a **violation of Article 8** in respect of the change of his legal guardian.

The judgment only is available in English.

Judgment

Sy v. Italy (application no. 11791/20), 24 January 2022

The applicant, Giacomo Seydou Sy, is an Italian national who was born in 1994 and lives in Mazzano Romano (Italy). He suffers from a personality disorder and a bipolar disorder. He was detained in Rebibbia Nuovo Complesso Prison (Rebibbia NC) in Rome when he lodged the

application. The case concerned the fact that the applicant, who suffered from a personality disorder and bipolar disorder, had remained in detention in an ordinary prison despite domestic court decisions stating that his mental health was incompatible with such detention and ordering his transfer to a Residential Centre for the enforcement of preventive measures (REMS), and later to a prison psychiatric service.

Relying on **Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights, the applicant submitted that his continued detention in an ordinary prison had prevented him from benefiting from therapeutic provision. Relying on **Article 5 § 1 (right to liberty and security)**, he alleged that his detention had been unlawful. Relying on **Article 5 § 5 (right to compensation),** he complained that he had had no effective remedy to obtain compensation for the damage he claimed to have sustained. He complained of a violation of **Article 6 § 1 (right to a fair trial)** on account of the failure to enforce the decision given by the Rome Court of Appeal on 20 May 2019. Relying on **Article 13 (right to an effective remedy)** read in conjunction with Articles 3 and 5 § 1, he submitted that he had had no effective remedy to complain of the absence of adequate therapeutic care during his detention. Relying on **Article 34 (right to individual petition)**, he submitted that Italy had failed to honour its obligations.

The Court noted that despite the clear, unequivocal statements by the domestic court the applicant's mental state had been incompatible with detention in prison, and that he had remained in an ordinary prison for almost two years. He had not had the benefit of any overall therapeutic strategy for treating his disorder, against a general background of poor conditions of detention.

The Court pointed out that on 21 January 2019 the Rome sentence enforcement judge had ordered the applicant's immediate transfer to a Residential Centre for the enforcement of preventive measures for one year. The Prison Administration Department then sent a large number of requests for admission to REMS's in the Lazio Region and beyond, unsuccessfully. The Court noted that in the light of such refusals, the domestic authorities had neither created new REMS places nor found any alternative solution.

As the Court had emphasised on several occasions in the past, Governments should organise their prison systems in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties. The Court considered therefore that it was incumbent on the Italian Government, in the absence of an REMS place, to find an appropriate alternative solution, as the Court had in fact explicitly stated in its interim measure issued under Rule 39.

a **violation of Article 3** (prohibition of inhuman or degrading treatment)
no violation of Article 5 § 1 (right to liberty and security) concerning the period of detention from 2 December 2018 to 20 May 2019;
a **violation of Article 5 § 1** concerning the period of detention from 21 May 2019 to 10 May 2020;
a **violation of Article 5 § 5** (right to compensation);
a **violation of Article 6 § 1** (right to a fair trial);
a **violation of Article 34** (right of individual petition).

The judgment is available only in French.

Judgment

Normantowicz v. Poland (application no. 65196/16), 17 March 2022

The applicant, Rafał Normantowicz, is a Polish national who was born in 1983. He has a long criminal record and is currently detained in Szczytno Prison.

The case concerns his complaints about inadequate medical care in detention and the authorities' review of whether he was fit for prison given his multiple ailments.
Relying on **Article 3 (prohibition of inhuman or degrading treatment)** of the Convention, Mr Normantowicz alleges that the authorities failed to ensure that he had surgery for his spinal problems, which led to him being confined to a wheelchair.

Also relying on **Article 6 (right to a fair trial within a reasonable time)**, he complains that it took the authorities more than a year to examine his application for release, despite his being in need of surgery and unfit for detention.

No violation of Article 3

The judgment is only available in English.

Judgment

Cosovan v. the Republic of Moldova (application no. 13472/18), 22 March 2022

The applicant, Serghei Cosovan, is a Moldovan national who was born in 1971 and lived in Chișinău until his death in 2021.

The case concerns the applicant's remand and then conviction on charges of fraud, for which he received, among other penalties, a seven-year prison sentence. It also concerns his medical treatment in and conditions of detention, as he suffered from, among other diseases, hepatitis and cirrhosis.

Relying on Article 2 (right to life), Article 3 (prohibition of inhuman and **degrading treatment) and Article 5 § 3 (right to liberty and security)** of the Convention, the applicant complains that the authorities failed to provide him with the necessary medical care, that his state of health was incompatible with detention, and that there were insufficient reasons given for his placement in pre-trial detention.

Violation of Article 3
Violation of Article 5 § 3

The judgment is only available in English.

Decision

Mayrapetyan v. Armenia (application no. 43/19), 31 March 2022

The case concerned medical care received by Samvel Mayrapetyan – a well-known businessman – while in detention. He required treatment that had not been available in Armenia. The Court held that his life was no longer at risk and that his complaints around access to medication and prescribed foods while still in detention was manifestly ill-founded.

Relying on **Articles 2 (right to life)** and **3 (prohibition of inhuman and degrading treatment)**, the applicant complained of the deterioration of his state of health and the authorities' refusal to allow him to travel abroad for urgent medical treatment and the healthcare and diet provided during his detention while ill.

Concerning **Article 2**, the Court stated that there was nothing to indicate that the applicant had been suffering from a life-threatening condition when placed in detention. Furthermore, he had had regular medical check-ups and had ultimately been released on bail when his health had

sharply deteriorated. Given these facts, the Court found that the applicant could no longer be considered a victim under Article 2 and it rejected that part of the application as inadmissible.

As for **Article 3**, the Court noted that the applicant had had free access to doctors of his choosing, including being seen at civilian hospitals when necessary. Although his condition worsened, the Court was satisfied that that had not been as a result of any negligence on the part of the authorities. Regarding the applicant's diet, no specific food had been prescribed, and he had been given a food heater in his cell promptly when requested. Given this, this part of the application was rejected as manifestly ill-founded.

The decision is final and it is available only in English.

Judgment

Miklić v. Croatia (application no. 41023/19), 7 April 2022

The case concerned Mr Miklić's placement in a psychiatric institution after his conviction on charges of intrusive and threatening behaviour committed as a minor and while lacking mental capacity.

Relying on **Articles 5 § 1 (right to liberty and security)** and **6 § 1 (right to a fair hearing)** of the Convention, the applicant complained about his compulsory placement in the psychiatric hospital. On the one hand, the court had failed to obtain a fresh expert opinion when ordering the continuation of his confinement and, on the other, it had failed to forward to his lawyer the opinion and the proposal of the hospital prior to the hearing of 13 February 2019, in breach of the equality of arms principle.

The Court considered that the prolongation of Mr Miklić's confinement had been decided in a procedure at odds with the domestic legislation and had not been based on objective and recent medical expert opinion. The Court was not convinced that either of the expert opinions relied on by the domestic courts could be considered both objective and recent within the meaning of the Court's case-law. It found in particular that none of the explanations provided justified the fact that no fresh expert evaluation had been ordered, as prescribed by domestic law.

Violation of Article 5 § 1 (right to liberty and security)

The judgment is available only in English.

Gender identity issues

Judgment

A.M. and Others v. Russia (application no. 47220/19) 06 July 2021

The applicant, A.M., is a post-operative transgender woman. She is the mother of M.M. and K.M., who were born in 2009 and 2012 respectively. In 2008 A.M., who was registered as "male" at that time, married a Ms N. In 2015 she gave the apartment where they resided to N. They divorced, with the applicant agreeing to pay maintenance. Later in 2015 the applicant was legally recognised as female.

From December 2016 onwards N. began objecting to the applicant's visiting their children, claiming that the visits caused them psychological harm. On 9 January 2017 N. initiated proceedings to restrict the applicant's access to the children. In particular, she argued that A.M.'s

gender status had caused irreparable harm to the mental health and morals of the children; could distort their perception of family; could lead to an inferiority complex and bullying at school; and could expose them to information on “non-traditional sexual relations”, such information being prohibited from distribution to minors. A.M. lodged a counterclaim, seeking contact rights.

On 19 March 2018 the court ordered the restriction of A.M.’s parental rights and dismissed her counterclaim. The court stated, also noting the expert findings, that A.M.’s gender transition would “create long-term psycho-traumatic circumstances for the children and produce negative effects on their mental health and psychological development”. The court did order that the issue should be re-examined when the children were older, without providing a specific time frame. Subsequent appeals and cassation appeals by the applicant were dismissed by the domestic courts.

According to the applicant, on an unspecified date Ms N. changed her place of residence with the children and A.M. has no information about where the children now reside. At present, she is deprived of any opportunity to receive information about their lives and health.

Relying on **Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination)**, the applicant complained that the restriction of her parental rights had not been necessary in a democratic society and had been discriminatory.

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**, and a violation of Article 14 (prohibition of discrimination) taken in conjunction Article 8.**

The Court found in particular that there had been no evidence of any potential damage to the children from the transition, and that the domestic courts had not examined the particular circumstances of the family. Furthermore, it found that the decision had been clearly based on the applicant’s gender identity and had thus been biased.

The judgment is only available in English.

Judgment

Fedotova and Others v. Russia (applications nos. 40792/10, 30538/14 and 43439/14), 13 July 2021

The case concerned the refusal to register the notice of marriage of the applicants, who are same-sex couples.

The Court found that Russia had an obligation to ensure respect for the applicants’ private and family life by providing a legal framework allowing them to have their relationships acknowledged and protected under domestic law. The lack of any opportunity for same-sex couples to have their relationships formally acknowledged created a conflict between the social reality of the applicants and the law. The Court dismissed the Government’s argument that the interests of the community as a whole could justify the lack of opportunity for same-sex couples to formalise their relationships. It concluded that, in denying access to formal acknowledgment of their status for same-sex couples, the Russian authorities had gone beyond the discretion (margin of appreciation) enjoyed by them. The Court stated that the choice of the most appropriate form of registration of same-sex unions remained at the discretion of the respondent State.

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.

On 12 October 2021, the Government requested that the case be referred to the Grand Chamber.

On 22 November 2021 the Grand Chamber panel of five judges decided to refer the case to the Grand Chamber.

Judgment

X. v. Poland (application no. 20741/10), 16 September 2021

Discrimination in custody case based on mother's relationship with another woman.

The case concerned proceedings the applicant brought to contest the removal of her youngest child from her custody after her former husband obtained a change in the custody arrangements ordered in the divorce judgment. She alleged that the courts had acted in his favour because of her relationship with another woman. Relying on Article 14 taken in conjunction with Article 8, the applicant complained that the domestic courts had refused to grant her custody of her child on the grounds of her sexual orientation.

The Court found that the applicant's sexual orientation and relationship with another woman had been consistently at the centre of deliberations and present at every stage of the judicial proceedings. It concluded that there had been a difference in treatment between the applicant and any other parent wishing to have full custody of his or her child. That difference had been based on her sexual orientation and therefore amounted to discrimination.

The European Court of Human Rights held, by six votes to one, that there had been: **a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life)** of the European Convention on Human Rights.

A request for referral has been made before the Grand Chamber but it was rejected it on Monday 28 February 2022.

The judgment is only available in English.

Judgment

Y v. Poland (application no. 74131/14), 17 February 2022

The case concerned applications by Y, a transgender man, to have reference to his gender assigned at birth removed from his birth certificate, or to have a new birth certificate issued.

Relying on **Articles 8 (right to respect for private and family life)** and **14 (prohibition of discrimination)**, the applicant complained that his birth certificate included reference to his gender at birth, and that he was discriminated against vis-à-vis adopted children, who were issued new birth certificates.

The Court found in particular that the applicant had been unable to demonstrate that he had suffered any disadvantage as a result of the decisions of the domestic authorities. They had balanced the interests at stake, acting within their discretion, when refusing to alter the full birth certificate.

no violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, and
no violation of Article 14 (prohibition of discrimination).

The judgment is only available in English.

Medical negligence

Judgment

[Gražulevičiūtė v. Lithuania (no 53176/17), 14 December 2021]

The applicant, Edita Gražulevičiūtė, is a Lithuanian national who was born in 1971 and lives in Vilnius. Ms Gražulevičiūtė is a rheumatologist and researcher. She was suspended in January 2012 after one of her patients died during a clinical trial she was carrying out on tocilizumab, a drug. The case concerns the proceedings the applicant brought to challenge her subsequent suspension and to claim compensation.

She notably complains that the final court decision regarding her suspension in December 2013, which exculpated her, was overturned, in breach of the principle of legal certainty under Article 6 § 1 (right to a fair trial) of the European Convention. **Relying on Article 8 (right to respect for private life)** to the Convention, she also complains that she was not compensated for the damage she sustained for being suspended for nearly two years.

Violation of Article 6 § 1

The judgment is available only in English.

Judgment

[Botoyan v. Armenia (application no. 5766/17), 8 February 2022]

The applicant, Marina Botoyan, is an Armenian national who was born in 1943 and lives in Artik (Armenia).

The case concerns surgery that Ms Botoyan underwent in 2008 and the complications that she suffered afterwards. The applicant initiated a criminal complaint against the surgeon, alleging medical malpractice.

Relying on **Article 8 (right to respect for private and family life)** of the European Convention on Human Rights, the applicant complains of the quality of her care in hospital, that she was not fully informed of the risks of the procedure, and that she had no effective remedy to complain of these issues.

No violation of Article 8 in respect of the obligation to provide a relevant regulatory framework
Violation of Article 8 in respect of the lack of access to a procedure capable of establishing the relevant facts, holding accountable those at fault and providing the applicant with appropriate redress.

The judgment is available only in English.

Judgment

[Reyes Jimenez v. Spain (application no. 57020/18), 8 March 2022]

The applicant, Luis Reyes Jimenez, is a Spanish national who was born in 2002 and lives in Los Dolores, Cartagena (Murcia). The application was lodged on his behalf by his father, Francisco

Reyes Sánchez. The case concerned a severe deterioration in the physical and neurological health of the applicant, who had been a minor at the time and who was now in a state of total dependence and disability following three surgical operations which he underwent to remove a brain tumour. Before the Court, the applicant, represented by his father, complained of failings in connection with the written informed consent requirement in respect of one of the operations.

Relying on **Article 8 (right to respect for private and family life)**, the applicant's parents submitted that they had not received full and adequate information regarding the surgical operations carried out on their son, and that they had therefore been unable to give their free and enlightened consent to those operations.

The Court concluded that the domestic courts, from the Murcian Higher Court of Justice right up to the Spanish Supreme Court, had failed to respond adequately to the requirement under Spanish law to obtain written consent in such cases. While the Convention in no way required such informed consent to be given in writing provided it was unambiguous, the Court observed that Spanish law did indeed require written consent. It considered that the courts had not adequately explained why they considered that the failure to obtain such written consent had not infringed the applicant's rights.

violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

Freedom of expression

Judgment

Gachechiladze v. Georgia (no. 2591/19), 22 July 2021

The applicant, Ani Gachechiladze, is a Georgian national who was born in 1995 and lives in Tbilisi.

The case concerns administrative-offence proceedings against the applicant, an entrepreneur, for her advertising of condoms. The domestic courts found that four of the designs she had used in the social media and on the packaging for the condoms she produced under the name Aiisa, meaning "that thing", were unethical. They were banned from future use.

Relying on Article 10 (freedom of expression), the applicant submits that her brand promoted the use of condoms and safe intercourse in a society in which sex and sex education are, according to her, considered taboo, and complains about the proceedings against her and the ban on using the four designs.

Violation of Article 10. No request for just satisfaction made.

The judgment is only available in English.

Prohibition of discrimination

Chamber judgment

Callamand v. France, (application no. 2338/20), 7 April 2022

The case concerned the rejection of the applicant's request for contact rights with her former spouse's child, who had been conceived by medically assisted procreation.

Relying on **Article 8** the applicant submitted that the rejection of her request for contact rights had breached her right **to respect for her private and family life**. **Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 8** the applicant argued that she had been discriminated against in the enjoyment of her right to respect for her private and family life The application was lodged with the European Court of Human Rights on 23 December 2019.

Having noted the existence of genuine personal links between the applicant and the child, which were protected by Article 8 of the Convention, the Court observed that the applicant had not sought the establishment of kinship or shared parental authority, but merely the possibility of continuing, occasionally, to see a child in respect of whom she had acted as a joint parent for more than two years since his birth.

The Court emphasised, firstly, that it was difficult to see, from the reasoning set out by the Bordeaux Court of Appeal, which had seen no need to conduct a psychological assessment of the child, why it had departed from the assessment of the Bordeaux tribunal de grande instance and the public prosecutor's office regarding the acceptance of the applicant's request. It noted, secondly, that the reasons given in the appeal court judgment did not show that a fair balance had been struck between the applicant's interest in protecting her private and family life and the child's best interests. It therefore found a violation of Article 8 of the Convention.

As regards the applicant's complaint concerning discrimination on grounds of sexual orientation, the Court, having noted that that complaint had not been raised before the domestic courts, concluded that the domestic remedies had not been exhausted as required.

The judgment is available only in French.

Restrictive measures in the context of the COVID-19 pandemic

Judgment

Communauté genevoise d'action syndicale (CGAS) v. Switzerland, (application no. 21881/20), 15 mars 2022

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.

On March 15th 2022, a judgment was delivered by the Court. As the applicant association, relying on **Article 11 (freedom of assembly and association)** of the Convention, complained of being deprived of the right to organise and participate in public events following the government measures adopted under Ordinance O.2 COVID-19, the European Court of Human Rights held,

by a majority (4 votes to 3), that there had been **a violation of Article 11** (freedom of assembly and association) of the European Convention on Human Rights.

The Court, while by no means disregarding the threat posed by COVID-19 to society and to public health, nevertheless held, 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 Court further observed that the domestic courts had not conducted an effective review of the measures at issue during the relevant period. The respondent State had thus overstepped the margin of appreciation afforded to it in the present case. Consequently, the interference had not been necessary in a democratic society within the meaning of Article 11 of the Convention.

The judgment is only available in French.

Requests for interim measures from 672 members of the French fire service concerning the Law on the management of the public health crisis fall outside the scope of Rule 39 of the Rules of Court

Abgrall and 671 Others v. France (application no. 41950/21)

On 24 August 2021 the European Court of Human Rights, sitting as a seven-judge Chamber, decided to reject the requests for interim measures submitted by members of the French fire service following the entry into force of Law no. 2021-1040 of 5 August 2021 on the management of the public health crisis. The Court considered that those requests lay outside the scope of Rule 39 of the Rules of Court (Interim measures).

The Court received the requests on 19 August 2021 from 672 full-time and voluntary members of the *Services départementaux d'incendie et de secours de France* (SDIS – French Departmental Fire and Emergency Services) and members working in hospitals.

Emphasising the urgency of the matter and relying on Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention on Human Rights, they requested that the Court:

- as their main submission, "*suspend the requirement to be vaccinated as set out in section 12 of the Law of 5 August 2021*".

- in the alternative, to "*suspend the provisions prohibiting persons who have failed to comply with the requirement to be vaccinated from exercising their occupation*", and to "*suspend the provisions interrupting the payment of salaries to persons who have failed to comply with the requirement to be vaccinated, as laid down in section 12 of the Law of 5 August 2021*".

The Court reiterates that measures under Rule 39 of the Rules of Court are decided in connection with proceedings before the Court, without prejudging any subsequent decisions on the admissibility or merits of the case. The Court grants such requests only on an exceptional basis, when the applicants would otherwise face a real risk of irreversible harm.

Climate change and implications on health

Verein KlimaSeniorinnen Schweiz and others v. Switzerland (application no. 53600/20)

The Chamber of the European Court of Human Rights to which the case Verein KlimaSeniorinnen Schweiz and others v. Switzerland (application no. 53600/20) had been allocated has relinquished jurisdiction in favour of the Grand Chamber of the Court.

The case concerns a complaint by a Swiss association and its members, a group of elderly people who are campaigning against the consequences of global warming on their living conditions and health.

The applicants submit that the respondent State has failed to fulfil its **positive obligations to protect life effectively (Article 2)** and to **ensure respect for their private and family life, including their home (Article 8).** They allege in particular that the positive obligations under the above-mentioned Convention provisions should be considered in the light of the principles of precaution and intergenerational fairness contained in international environmental law. In this context they complain that the State has failed to introduce suitable legislation and to put appropriate and sufficient measures in place to attain the targets for combating climate change.

They further complain that they have not had access to a court within the meaning of **Article 6** of the Convention, alleging that the domestic courts have not properly responded to their requests and have given arbitrary decisions affecting their civil rights, in particular totally rejecting their specific situation of vulnerability in relation to heatwaves.

Lastly, the applicants complain of a **violation of Article 13 (right to an effective remedy),** arguing that no effective domestic remedy is available to them for the purpose of submitting their complaints under Articles 2 and 8.

The application is only available in French.

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

European Court rejects request for an advisory opinion on biomedicine treaty

The European Court of Human Rights has decided not to accept the request for an advisory opinion submitted by the Council of Europe's Committee on Bioethics (DH-BIO) under Article 29 of the Convention on Human Rights and Biomedicine ("the Oviedo Convention").
The DH-BIO asked the European Court of Human Rights to provide an advisory opinion on two questions regarding the protection of the human rights and dignity of persons with mental disorders in the face of involuntary placement and/or treatment.

The Court rejected the request because, although it confirmed, generally, its jurisdiction to give advisory opinions under Article 29 of the Oviedo Convention, the questions raised did not fall within the Court's competence.

This was the first time the European Court had received a request for an advisory opinion under Article 29 of the Oviedo Convention. Such requests should not be confused with requests for an advisory opinion under Protocol No. 16, which allows the highest courts and tribunals, as specified by member States which have ratified it, to request advisory opinions on questions of

principle relating to the interpretation or application of the rights and freedoms defined in the European Convention on Human Rights or its Protocols.

The decision is final.

The European Convention and its Protocols:

Protocol No. 15 to the European Convention on Human Rights entered into force on 01 August 2021.

This Protocol amends the Preamble to the Convention, which now includes a reference to the subsidiarity principle and to the margin of appreciation doctrine. In addition, the 6-month time-limit for submitting an application to the Court after the final national decision will be reduced to four months, starting from 1 February 2022.

This Protocol also makes the following changes to the Convention:

– concerning the admissibility criterion of "significant disadvantage", the second condition, namely that a case which has not been duly considered by a domestic tribunal cannot be rejected, has been amended and this proviso is now deleted;

– the parties to a case may no longer object to its relinquishment by a Chamber in favour of the Grand Chamber;

– candidates for a post of judge at the Court must be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly.

Adopted in 2013, Protocol No. 15 has been ratified by all the member States of the Council of Europe.

Protocol No. 15: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms; Details of Treaty No. 213 – Protocol No. 15; Explanatory report on Protocol No. 15