THE AIRE CENTRE
Advice on Individual Rights in Europe

CIVIL RIGHTS DEFENDERS

The Protection of Human Rights during Times of Emergency

An analysis of the relevant jurisprudence of the European Court of Human Rights through the lens of the Covid-19 pandemic

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Editors

Biljana Braithwaite, Western Balkans Programme Director, the AIRE Centre
Catharina Harby, Senior Legal Consultant, the AIRE Centre
Goran Miletić, Director for Europe and MENA, Civil Rights Defenders

Main contributors

Ledi Bianku, former Judge at the European Court of Human Rights and Associate Professor, University of Strasbourg
Hannah Smith, Lawyer and Legal Project Manager, the AIRE Centre

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Preface

Emergency situations, such as the Covid-19 pandemic, present complex questions regarding how State authorities can and should balance their responsibility to respond quickly and effectively to an emergency, whilst continuing to safeguard the range of rights and freedoms which may be impacted by an emergency response. The severity of the threat to health posed by the Covid-19 pandemic, its unpredictable and ever-evolving nature, and the initial lack of knowledge regarding how best to prevent the spread of the virus, gave rise to unprecedented challenges. On the one hand, States were required to act quickly to take measures to contain the spread of the virus and to protect the life and health of their citizens. On the other hand, the measures taken to protect health impacted the enjoyment of numerous other rights and freedoms.

When States are required to respond quickly to a serious and complex emergency, it is clear that rigorous parliamentary scrutiny of emergency measures and their compatibility with human rights might not always be possible. In this context, effective and independent judicial scrutiny of emergency measures becomes yet more essential to hold governments to account and protect fundamental rights. Exceptional measures which are taken to protect the life and health of a nation must still comply with the paramount Convention principles of lawfulness and proportionality. Courts, as well as independent ombudspersons, have a vital role to play to monitor compliance with these principles. They must seek to ensure that human rights remain a central consideration to any emergency response, that emergency measures serve the purpose for which they were introduced and that they do not interfere with Convention rights beyond the extent that is absolutely necessary in the context of the emergency.

In 2020, in the midst of the Covid-19 pandemic, the AIRE Centre and Civil Rights Defenders published our guide on Covid-19 and Human Rights, which analysed the Convention rights most likely to be affected by the pandemic, and by government responses to contain it. Now, over two years later, this publication on the Protection of Human Rights during Times of Emergency incorporates the key relevant European and domestic jurisprudence delivered since March 2020, concerning States' responses to the Covid-19 pandemic. The publication provides, therefore, practical guidance on how to approach the novel questions which arose during the pandemic. For example, how to balance the different rights engaged

in contexts ranging from compulsory vaccination to the imposition of lockdowns. The general principles applied in these cases and analysed within this publication are, however, applicable more broadly to other emergency situations, and indeed to any situation in which it is necessary to balance seemingly competing rights.

As we emerge from the pandemic, this publication also serves as a tool to highlight key lessons learned during this unprecedented time regarding the effective protection of human rights in times of emergency. This includes the key factors that must be considered when balancing competing rights and interests in the context of an emergency and how principles such as proportionality and subsidiarity are and should be invoked in this context. It also includes guidance on the role of the judiciary in scrutinising emergency measures, what exactly constitutes effective and independent judicial scrutiny during times of emergency and how courts can adapt to function in a Convention compliant manner during times of emergency. As States across Europe continue to face new challenges and emergencies, including the war in Ukraine and the climate and energy crises, it is essential to understand such issues to future-proof the protection of human rights in the face of such turbulent and unpredictable times.

The publication forms part of the wider Rule of Law Platform project,[1] a regional online platform designed by the AIRE Centre and Civil Rights Defenders to provide information on rule-of-law developments, in particular the latest jurisprudence from the ECtHR, in Albanian, B/C/M/S, Macedonian and English. It will also provide the framework for discussion of the topic: "Human Rights in Times of Emergency - the Role of the Judiciary Under the European Convention on Human Rights" at the Ninth Annual Regional Rule of Law Forum for South East Europe in November 2022. Since 2014, this Forum has brought together representatives of the European Court of Human Rights, supreme and constitutional courts, presidents of judicial councils, ombudspersons, directors of judicial training academies and institutions, government agents before the Strasbourg Court, representatives of NGOs, and prominent legal experts from across the region to discuss the most relevant issues under the European Convention on Human Rights for the Strasbourg and national jurisdictions participating in the Forum.

We hope that this publication will prove a useful resource to courts continuing to decide cases on issues that have arisen in the context of the Covid-19 pandemic, as well as lawyers and non-governmental organisations working

[1] https://www.rolplatform.org/rule-of-law/

with individuals whose rights and freedoms were affected during the pandemic. Ultimately, we also hope it will serve to reinforce that human rights should not be viewed as an obstruction to responding efficiently to an emergency or crisis situation, nor as concepts which can be temporarily ignored or de-prioritised in the face of an emergency. Instead, the principles of legality and proportionality, and the protection of human rights, can and should be central to any emergency response. In situations where legislative scrutiny might be limited, it is imperative that courts and ombudspersons continue to function and scrutinise emergency measures. This may require a certain level of creativity and flexibility. However, the Covid-19 pandemic has proved that it can be done and provided key lessons on how to ensure the effective functioning of judiciaries during times of emergency going forward.

Biljana Braithwaite
Western Balkans Programme
Director, the AIRE Centre

Goran Miletić
Director for Europe and MENA,
Civil Rights Defenders

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List of Acronyms

The following table describes the significance of various abbreviations and acronyms used throughout the handbook.

Abbreviation	Definition
ECHR / the Convention	The European Convention on Human Rights
The Court / the ECtHR	The European Court of Human Rights
State(s)/ Contracting State(s)	Contracting State(s) of the European Convention on Human Rights
Western Balkan States	Albania, Bosnia and Herzegovina, Kosovo, Montenegro, the Republic of North Macedonia and Serbia
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
Istanbul Convention	The Council of Europe Convention on preventing and combating violence against women and domestic violence
Lanzarote Convention	The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CPT Statement of Principles	CPT's Statement of Principles relating to the treatment of persons deprived of their liberty in the context of the Covid-19 pandemic
PPE	Personal Protective Equipment

Notes on Citations, Footnotes and Case Summaries

For European Court of Human Rights cases, references will give the name in italics, the date of the decision or the judgment, and the application number. It will also be noted where cases that are mentioned in the text are summarised in Part 2 of this Guide.

References to Articles and Protocols

All references to Articles and Protocols are to Articles and Protocols of the ECHR, unless otherwise stated.

PART 1

Introduction

As with previous publications, this year's Guide on Human Rights in Times of Emergency is divided into two Parts. Part 1 consists of the narrative and Part 2 consists of summaries of selected judgments and decisions of the European Court of Human Rights (hereinafter: the Court or the ECtHR).

The narrative in Part 1 analyses the ECtHR jurisprudence in respect of emergency situations through the lens of the Covid-19 pandemic. In many respects, the Covid-19 pandemic was an unprecedented and unique form of public emergency. Initially entirely unpredicted, the sudden and severe impact of the Covid-19 pandemic took States by surprise and demanded a quick response from authorities without the knowledge or experience to understand how best to prevent the spread of the virus. However, the length, scope and ever-evolving nature of the Covid-19 pandemic also mean that it provides an invaluable opportunity to reflect on States' emergency responses, as well as the domestic and European caselaw developed during this time, to increase understanding of how to secure a Convention compliant response to future emergency situations.

The scope of the rights engaged by the pandemic and States' responses to it, the number of States impacted, and the diverse range of measures taken to protect health and to ensure the continued functioning of legislative and judicial bodies, mean there are many aspects of the pandemic from which to gain valuable lessons learned. Additionally, the Court's case law relating to situations which arose during the pandemic drew on and developed general principles of wider application beyond the pandemic.

Following this introduction, Chapter I of Part 1 of the Guide analyses the rights affected by the Covid-19 pandemic and the obligations on States to respond to the pandemic under the ECHR. A previous version of this Guide[2]

[2] https://www.rolplatform.org/covid-19-and-the-impact-on-human-rights "Covid-19 and the Impact on

I analysed the Convention rights most likely to be affected by the Covid-19 pandemic and by government responses to contain it. The narrative was based on the ECHR provisions, judgments and decisions which appeared to be most relevant to the legal issues raised by the pandemic and it sought to apply the existing case law of the Strasbourg Court to the novel set of facts with which we were faced. Chapter I of this Guide now takes account of the domestic and European case law, guidance and other relevant legal instruments published over the course of the pandemic.

The subsections of Chapter I are divided into the separate Articles of the ECHR which were affected during the pandemic, either because of the threat to health caused by the pandemic itself or as a result of States' interventions to attempt to contain the spread of Covid-19. It briefly analyses how the identified Convention rights were engaged and suggests the positive obligations the Covid-19 pandemic created for States. It also reviews how, in some circumstances, the effects of the pandemic and the measures taken to respond to it disproportionately impacted certain groups, and suggests some of the obligations that might have arisen to make reasonable adjustments to accommodate for the differences in the populations that the measures sought to protect.

As Chapter I of Part 1 of the Guide explains, not all Convention rights are engaged in the same way by an emergency situation. For example, the virulence and spread of Covid-19 threatened the well-being of individuals, engaging issues concerning the right to medical treatment, as interpreted in the framework of the right to life, the right not to be subjected to ill-treatment or degrading treatment, and the right to private life etc. Chapter I explains that the Convention, as interpreted by the Court, required States to undertake positive measures to prevent the spread of Covid-19 to try to limit the spread of infection amongst the population, and to offer appropriate medical treatment to those who are infected.[3] These obligations might be more evident in the case of persons for

Human Rights: An overview of relevant jurisprudence of the European Court of Human Rights", The AIRE Centre and Civil Rights Defenders, September 2020

[3] See the development of the case-law from *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, no. 23413/94 and *Osman v. the United Kingdom*, Grand Chamber judgment of 28 October 1998, no.23452/94 (included as a summary in this publication), to *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13 (included as a summary in this publication), as well as *Feilazoo v. Malta*, judgment of 11 June 2021, no. 6865/19 (included as a summary in this publication). See also: https://www.ejiltalk.org/part-iii-due-diligence-and-covid-19-states-duties-to-prevent-and-halt-the-coronavirus-outbreak "Due Diligence and

whom the State assumes responsibility or in respect of those who are particularly vulnerable.[4]

On the other hand, in trying to comply with these obligations, Member States implemented numerous unprecedented measures such as lockdowns, quarantines, enforced social distancing and shielding which in turn interfered with other Convention rights.[5] These terms are referred to regularly throughout this Guide and a general definition for each is set out below.

"**Lockdown**" is a term taken from American prison practices. It describes the situation where prisoners are deprived of their normal freedoms such as recreation and association in response to a temporary emergency within the prison. In the Covid-19 context, the term is used by analogy to describe restrictions on freedom of movement and contact both within and outside families and groups which are imposed as general measures on the population at large with the aim of limiting the spread of the virus. These measures apply to everyone irrespective of whether they have been identified as suspected carriers of the virus or as victims of it. There are exceptions to the application of the measures which are specified in the relevant laws, regulations or government guidance. Lockdown is thus, typically, a restriction on freedom of movement and on the enjoyment of family life, social life and economic life.

"**Quarantine**" is the term which is used to describe measures taken against specific individuals or members of whole designated groups who have been identified as suffering from the virus or who are suspected of being actual or possible carriers of it. People in quarantine are typically confined to a specified location and not permitted to leave it for any reason until the risk they pose to others has passed. Quarantine typically goes further than the restrictions involved in "lockdown" and may constitute a deprivation or restriction of liberty depending on a whole range of factors.[6]

COVID-19: States' Duties to Prevent and Halt the Coronavirus Outbreak", Antonio Coco, Talita de Souza Dias, 24-25 March 2020, Parts I, II and III

[4] See *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Grand Chamber judgment of 17 July 2004, no. 47848/08 (included as a summary in this publication)

[5] For an analysis of a broad range of issues raised by the pandemic crisis see: "État de droit, état d›exception et libertés publiques", Francoise Tulkens and Saba Parsa,Anthemis, 2022

[6] The range of factors involved in the decision as to whether a measure constitutes a deprivation of liberty or a restriction on freedom of movement are discussed in detail in the section on Article 5 (Right to Liberty) in Chapter

"**Shielding**" is a term which is used to describe the practice of protecting clinically extremely vulnerable individuals from Covid-19, who would, if infected, be at a very high risk of severe illness. These individuals are advised by the government to 'shield' themselves from the rest of the population to avoid the risk of infection. Depending on the level of risk attributed to that individual, this could simply involve strict adherence to social distancing guidelines or 'complete shielding' through avoidance of supermarkets, gatherings and contact outside the home altogether. Vulnerable individuals are thus required to follow a more cautious set of rules than the rest of the population. However, unlike social distancing, lockdown and quarantine measures, shielding is generally for individual personal protection.

"**Social distancing**" is a term which is used to describe guidelines intended to minimise contact (normally with those outside an individual's 'household') and thus the risk of community transmission. The World Health Organisation recommends a distance of at least one meter between individuals of a different household. Thus the social distancing guidelines in Europe vary between States from one meter to two meters. Individuals and businesses may be subject to fines for failure to respect social distancing guidelines.

Additionally, as vaccinations and testing facilities were developed, so too were new vaccination policies, with access to travel, assembly, public and private spaces, and in some cases professions, made conditional on vaccination status and/or the provision of a negative Covid-19 test.[7] There have been interferences with many Convention rights as a result of the adoption of measures to protect health, including those described above. For example, the right to private and family life, to move freely within the country and to protest. Schools, places of worship, and businesses were closed, raising issues regarding the right to education, the right to worship, freedom of expression and the right to peaceful enjoyment of property. Additionally, access to courts was restricted and the length of civil and criminal proceedings was prolonged.

The analysis in Chapter I is not, however, limited to the novel questions and situations which arose specifically during the pandemic. It also highlights and

I of this publication

[7] See for example the chronology of measures taken by the European Commission in reaction to the Covid-19 pandemic including support for the vaccine rollout across Europe: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/timeline-eu-action_en

explains the general principles applied by the Court in the relevant case law, which are applicable to any emergency situation as well as any situation in which States must balance numerous, seemingly competing rights.

Following the adoption of national emergency legislation some States also chose to derogate from the Convention on the basis of Article 15, prompting a reaction from the Secretary General of the Council of Europe (hereinafter the Secretary General).[8] The pandemic represents the first time in Convention history during which States reacted to the same emergency situation and to very similar problems, in such different ways. The divergence in approach taken by States with respect to derogating under Article 15 ECHR, declaring a national state of emergency and the procedures used to introduce emergency measures, provides a useful comparative study of the necessity and utility of derogating from the ECHR. Chapter II of Part 1 of this Guide therefore examines the decisions taken to derogate or not to derogate from the Convention during the pandemic and explains the procedure and conditions for derogation under the ECHR during times of emergency more generally.

Even where States did not declare a state of emergency, the Covid-19 pandemic prompted many of them to adopt new legislative and administrative measures, and in many cases States granted exceptional powers to the executive to design and implement measures ordinarily outside their area of competence. Exceptionally, the operation of democratically elected institutions and the judiciary was either interrupted or limited for a few weeks and in some cases longer. This was particularly evident in countries of the Western Balkans. Concerns were raised as to whether this situation could endanger the rule of law and democracy; two Convention principles without which it would be almost impossible to protect human rights.[9] Across States, varying approaches were taken to ensure the continued functioning of the legislature and the judiciary, adopting different procedures for review of the measures introduced to respond to the pandemic. It is, however, important to emphasise that, under the Convention, whatever

[8] https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 SG/Inf(2020)11, 7 April 2020, "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis - A toolkit for Member States"

[9] See "The Rule of Law Stress Test - EU Member States' Responses to Covid-19", Michael Meyer-Resende and Théo Fournier", Democracy Reporting International, May 2020, at www.democracy-reporting.org and https://democracy-reporting.org/en/office/EU/publications/emergency-measures-and-the-rule-of-law-in-the-age-of-covid-19 "Emergency measures and the rule of law in the age of covid-19", Jakub Jaraczewski, 31 March 2020.

the purported solution adopted by Member States when confronted with the pandemic, derogation or not, their actions must always be in conformity with the text, principles and spirit of the Convention.

For this reason, Chapter III of Part 1 is dedicated to institutional and procedural guarantees during a crisis situation. This Chapter stresses the importance of judicial, parliamentary and other forms of scrutiny of emergency measures and the need for the principles of legality and proportionality to be central to any emergency response. These principles form the foundations of the Convention system and apply both in normal and exceptional situations. They are relevant, in relation to emergency situations, irrespective of whether Member States have derogated under Article 15 or not. In addition, this Chapter analyses institutional guarantees and their critical role in ensuring that the principles of legality and proportionality are duly respected during the Covid-19 crisis. These principles, and the manner in which institutions monitor their application, are extremely important in assessing the compatibility with the Convention of any measures taken by governments to respond to an emergency.

Part 2 of the Guide, as always, includes summaries of the judgments of the Court that are considered relevant to the topic dealt with. In this instance, that includes cases which arose during the Covid-19 pandemic, relating directly to measures taken by States to respond to it, in addition to cases which pre-date the pandemic, but which relate most closely to the human rights concerns which arose throughout the pandemic.

Several judgments and decisions relating to the Covid-19 pandemic have now been decided by the ECtHR. However, numerous applications concerning the Covid-19 pandemic remain pending before the ECtHR and other courts,[10] and the jurisprudence delivered so far does not cover the entirety of the wide-ranging issues which arose. As a result, Parts 1 and 2 of the Guide also draw on the extensive existing, relevant ECtHR case law, for example related to the protection of health of persons who are in detention or for whom the state has assumed responsibility, the medical treatment of vulnerable persons and the rights of

[10] In other jurisdictions such as the United States, there has been an increase in class action cases related to Covid-19 measures and restrictions. See, for example: https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases-2020#Event%20Cancellation%20and%20Service%20Disruption "Class Action Litigation Related to COVID-19: Filed and Anticipated Cases in 2020", last updated March 9, 2021

persons receiving medical treatment. Part 1 also incorporates references to the many and varied decisions of domestic courts in respect of measures taken by their governments in response to the pandemic.

Whilst the situation is certainly unprecedented in Convention history, and the outbreak of the Covid-19 pandemic was not foreseen, it should also be noted at this point that the ECHR was drafted with an awareness of the impact of infectious diseases such as smallpox, cholera, polio and influenza and exceptional situations in general. The drafters in the late 1940's would have lived through the "Spanish flu" epidemic of 1918-20 which killed somewhere between 17 and 50 million people worldwide.[11] At the time, compulsory quarantine and similar measures were amongst the only mechanisms to contain the spread of such diseases, as vaccines and other medical treatments were still in the process of development. For example, vaccines for polio were not developed until the 1950's.[12]

The Convention drafters were thus personally aware of the need for tools for containing outbreaks of infectious diseases and such mechanisms were thus built into the text of the Convention. Article 5 § 1 (e) (permitting the lawful detention of persons for the prevention of the spreading of infectious diseases) and Article 2 § 3 of Protocol No. 4 (permitting restrictions to be placed on the exercise of free movement rights for the protection of health) provide two relevant examples of this.

Clearly the framework of the Convention was designed to ensure its provisions not only endure crisis situations, but also help to shape States' responses in such situations.[13] Its use was foreseen not as an obstacle to taking measures to protect health, but to ensure that any measures taken were 'lawful' and proportionate. It must also be said that the Convention has proved successful in operating in many Member States during an emergency; in such extraordinary situations upholding the protection guaranteed by the Convention is more important than ever.[14]

[11] https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html "1918 Pandemic (H1N1 virus)", Centers for Disease Control and Prevention, page last reviewed 20 March 2019

[12] https://www.historyofvaccines.org/timeline/all "The History of Vaccines", Resource by the College of Physicians of Philadelphia

[13] See "*Implementing the European Convention on Human Rights in times of economic crisis*", European Court of Human Rights, 2013, Seminar to mark the opening of the judicial year of the European Court of Human Rights Strasbourg, 25 January 2013

[14] See: ejiltalk.org/the-myth-and-mayhem-of-build-back-better-human-rights-decision-making-as-the-human-dignity-imperative-in-covid-19/ "The Myth and Mayhem of 'Build Back Better': Human Rights

We hope, therefore, that this Guide will be a useful tool for all those who continue to interpret and apply Convention Rights in the context of the ongoing impact of the Covid-19 crisis. In addition, the Covid-19 pandemic provides a useful lens through which to analyse the ECtHR's jurisprudence on emergency situations more generally and this Guide also aims to set out the principles and procedures developed during the pandemic, which can and should be applied during any emergency situation.

Decision-Making and Human Dignity Imperatives in COVID-19", Diane Desierto, 25 May 2020

Chapter I – Rights engaged by the Covid-19 pandemic and by States' responses to the pandemic

States have a general obligation under the ECHR to take adequate measures to protect individuals from the spread of Covid-19 and from being avoidably infected and suffering its consequences. These obligations arise primarily under Articles 2 (Right to life), 3 (Protection from inhuman and degrading treatment) and 8 (Right to respect for private and family life).

This Chapter explores the situations in which these obligations to protect life and health might arise, and the exact scope of the positive duties which might be placed upon States under the Convention, in the context of the Covid-19 pandemic. It also examines the ways in which different Convention rights have been affected by the measures taken by States to protect life and health and contains analysis of the extent to which the interferences with each right may be viewed as justified. This analysis takes account of the limited number of judgments and decisions of the Court delivered since March 2020 which relate directly to the measures taken during the Covid-19 pandemic. It also refers to cases concerning the Covid-19 pandemic which, at the time of writing, are pending before the Court. Where relevant, it is also informed by references to pertinent domestic judgments concerning measures taken during the pandemic and their impact on human rights. Otherwise, the analysis draws on existing principles and caselaw of the Court which can be applied by analogy to the context of the Covid-19 pandemic as well as other emergency situations.

Each section of the Chapter focuses on a different Convention right. It is however acknowledged that the Convention rights do not operate in silo, and that an understanding of their interconnectedness is a vital part of ensuring their

effective protection. As such, the sections within this chapter contain multiple cross-references to other parts of the publication to highlight the relevance of other rights to the analysis within a section, and to direct the reader to the relevant discussion on such rights within this publication.

1. Article 2 – Right to life

Article 2, the right to life, is one of the most fundamental provisions in the Convention. It is a non-derogable right during peacetime, which means States could not suspend their obligations under this provision during the Covid-19 pandemic. Article 2 provides:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

a. Positive obligations to safeguard life

Article 2 requires States to refrain from unlawful deprivation of life (a negative obligation), and also to take measures to safeguard the lives of those within their jurisdiction (a positive obligation). The positive obligations on States in this context take different forms, including regulatory obligations and operational obligations, as briefly analysed below.[15]

[15] See Elizabeth Stubbins Bates "COVID-19 Symposium: Article 2 ECHR's Positive Obligations–How Can Human Rights Law Inform the Protection of Health Care Personnel and Vulnerable Patients in the COVID-19 Pandemic?" in https://opiniojuris.org/2020/04/01/covid-19-symposium-article-2-echrs-positive-obligations-how-can-human-rights-law-inform-the-protection-of-health-care-personnel-and-vulnerable-patients-in-the-covid-19-pandemic/; M. Baros "The UK Government's Covid-19 Response and Article 2 of the ECHR (Title I Dignity; Right to Life, Charter of Fundamental Rights of the EU)", 31 August 2020, DOI:10.3390/laws9030019Corpus ID: 225212350.

Regulatory obligations

Article 2 requires States to establish a framework of laws and to implement regulatory frameworks to protect life.[16] Whenever a State undertakes, organises or authorises dangerous activities, it must ensure through a system of rules and through sufficient control that the risk to life posed by undertaking such activities is reduced to a reasonable minimum.[17] This includes regulating the licensing, setting up, operation, security and supervision of activities deemed to be inherently hazardous or dangerous, in a way which is tailored to the special features of the activity in question.[18] States must make it compulsory for all concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the risks inherent in the activities they undertake. Such tasks, which can be difficult even in normal circumstances, could prove yet more arduous when authorities seek also to control the behaviour of citizens during times of emergency. For example when controlling the movement of people, the times and conditions under which they are allowed outside, and limiting mass gatherings and demonstrations, including demonstrations against extraordinary measures. In such conditions particular care in adopting operational measures is required to ensure that excessive or lethal force is not employed under the pretence of protecting people from the spread of Covid-19 and to ensure that the operational measures implemented are sufficiently well-researched and justified by relevant scientific research.[19]

Activities "organised" or "authorised" by the State, which are ordinarily deemed safe, were, during the pandemic rendered inherently dangerous purely because they involved contact with other people and so a threat of contracting Covid-19. This included, for example, going to school, work, hospitals, leisure centres, libraries, museums, shops and taking public transport. The regulatory obligations

[16] *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13, § 166 (included as a summary in this publication); *Lambert and Others v. France*, Grand Chamber judgment of 5 June 2015, no. 46043/14, § 140; *Oyal v. Turkey*, judgment of 23 March 2010, no. 4864/05, § 54 (included as a summary in this publication)

[17] *Mučibabić v. Serbia*, judgment of 12 July 2016, no. 34661/07, § 126

[18] *Cevrioğlu v. Turkey*, judgment of 4 October 2016, no.69546/12, § 57

[19] See for example Abi Dymond and Neil Corney, "*COVID-19, Consent and Coercion: New United Nations Guidance on Less Lethal Weapons in Law Enforcement in the context of the coronavirus*", 22 May 2020. In https://www.ejiltalk.org/covid-19-consent-and-coercion-new-united-nations-guidance-on-less-lethal-weapons-in-law-enforcement-in-the-context-of-the-coronavirus/

under Article 2 require that governments implement regulatory frameworks to ensure adequate health and safety guidelines and procedures are introduced and followed in these spaces, to prevent the spread of Covid-19.[20] For example, such guidance and regulations could advise on how to ensure social distancing, require the erection of screens to separate people who would be in close proximity, or mandate wearing a face mask in certain locations, such as on public transport. Alternatively, depending on the level of risk posed, it may be deemed necessary to close or restrict physical access to these places/services, if systems cannot be devised for them to remain open without posing a threat to life.

Hospitals

In a public health context, States are required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of the lives of patients and staff.[21] The positive obligations on a State in this context must respond to changing contexts, according to data and information available to them. To ensure an Article 2 compliant response to Covid-19, governments were therefore required to amend and update the regulations governing the operation of hospitals within their jurisdiction to seek to protect the lives of their patients and staff from the threat to life posed by Covid-19.

Operational obligations to take preventative measures

States also have an obligation to take preventive operational measures to safeguard individuals from specific threats to life arising from 'dangerous situations',[22] in the context of both private and public activities,[23] where the State knew or reasonably ought to have known about the threat (the Osman test).[24] This duty extends to preventing deaths arising from industrial, environmental

[20] *Vilnes and Others v. Norway*, judgment of 5 December 2013, nos. 52806/09 22703/10

[21] *Calvelli and Ciglio v. Italy*, judgment of 17 January 2002, no. 32967/96 (included as a summary in this publication)

[22] *Stoyanovi v. Bulgaria*, judgment of 9 November 2010, no. 42980/04

[23] *Oneryildiz v. Turkey*, Grand Chamber judgment of 30 November 2004, no 48939/99 (included as a summary in this publication)

[24] The so-called Osman test elaborated for the first time by the Grand Chamber in the case of *Osman v. the United Kingdom*, Grand Chamber judgment of 28 October 1998, no.23452/94, § 116 (included as a summary in this publication)

and natural disasters.[25] The Court's case law on contagious diseases is limited,[26] and it has not yet been considered whether Covid-19 would come within the definition of a 'natural hazard' or some other category.

The Osman Test

The Osman test, mentioned above, suggests that:

> *"It must be established to (the Court's) satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."*

(i) Does an operational duty arise to take measures to prevent deaths from Covid-19?

It is arguable that States across Europe have been aware of the threat to life posed by Covid-19 and the risk that the virus would spread to, and within, their jurisdictions, since January 2020. If this is the case, Covid-19 could be deemed to constitute a specific threat to life about which the State knew or ought reasonably to have known and against which the State has an obligation to protect its citizens.

The difficulty with a pandemic such as Covid-19 is that identification of the individual or individuals whose life is/are at risk is almost impossible, as the entire population of a State could become infected. This factor is relevant to the question of the extent to which Article 2 is engaged in two ways. First, in order for an individual to be able to claim to be a "victim" of a violation of the Convention, within the meaning of Article 34 (individual applications), the individual must:

[25] For example, deaths resulting from an accidental explosion at a rubbish tip close to a shanty town (*Öneryıldız v. Turkey*, Grand Chamber judgment of 30 November 2004, no 48939/99 (included as a summary in this publication)); loss of life occasioned by a foreseeable mudslide due to the failure of the authorities to implement land-planning and emergency-relief policies (*Budayeva and Others v. Russia*, judgment of 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (included as a summary in this publication)); and death as a result of prolonged exposure to asbestos in a government-run ship yard (*Brincat and Others v. Malta*)

[26] See *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00 (included as a summary in this publication); *Oyal v. Turkey*, judgment of 23 March 2010, no. 4864/05 (included as a summary in this publication)

- Show that he or she was "directly affected" by the measure complained of; and
- Produce reasonable and convincing evidence of the likelihood that he or she will be (or was) personally affected by a violation of the Convention.

An individual cannot, therefore, complain in the abstract about the inadequacy of measures taken to protect the general population from the effects of the Covid-19 pandemic (for example a failure to provide appropriate PPE to health workers, patients, and the general population, or to introduce mass screening for all). He or she must provide specific information on their own condition and how the alleged failings of the authorities to respond appropriately to the pandemic impacted their own health or private life.[27]

This difficulty also influences the other criteria of the Osman test, the requirement for a real and immediate risk.[28] It would be difficult for any State to know who amongst millions of its citizens is facing a real and immediate risk of being infected with Covid-19. Further, those who have contracted Covid-19 have experienced it in different ways, whilst it is a life-threatening virus for some, others experience no symptoms at all. It would therefore be even more difficult to identify from those who are at a real and immediate risk of being infected by Covid-19, those to whom Covid-19 poses a real and immediate threat to life.[29] However, this difficulty might be countered by the fact that it has been possible to

[27] See *Le Mailloux v. France*, decision of 5 November 2020, no. 18108/20 (included as a summary in this publication)

[28] See *Taplis v. Italy*, judgment of 2 March 2017, no.41237/14, and especially the separate opinions of judges Eicke and Spano

[29] For example, in June 2021, the High Court of England and Wales found that there was no general duty on the United Kingdom government under Article 2 to provide housing to all destitute, failed asylum seekers in the country, to protect them from living in overcrowded accommodation where the risk of contracting Covid-19 was higher. The High Court overturned a lower court's decision requiring the government to provide housing to the individual in question because the lower court's decision was deemed to be based entirely on the generic risk posed to destitute asylum-seekers "as a class" and to the "public at large" from infection by members of that class. The court took account of the fact that the risks posed by Covid-19 vary from person to person depending on a number of factors including, in particular, age. As there had been no individualised assessment of the risk posed to the individual in question, he had not demonstrated a "real, immediate and serious risk to his life" as would have been required to give rise to an obligation under Article 2. See: R (Secretary of State for the Home Department) v First-tier Tribunal (Social Entitlement Chamber), judgment of 21 June 2021 [2021] EWHC 1690 (Admin)

identify groups of people who are more 'at risk' of contracting Covid-19[30] or who are more vulnerable to its effects, for example the elderly or those with certain pre-existing health conditions.[31] The timing and nature of the intervention by the authorities will also be relevant. If a particularly vulnerable or at-risk group can be identified, States could be required to take positive measures to protect people in this group before any individual complaint or request for assistance is made. Such a group might include healthcare professionals who are more likely to be repeatedly exposed to the virus.[32]

(ii) The scope of the operational duty

If it is established that a State does have an operational duty to take measures to protect lives from Covid-19, it is unclear exactly what that duty would entail. States typically have a wide margin of appreciation regarding the methods adopted to fulfil their operational duties. An impossible or disproportionate burden must not be imposed on the authorities and consideration must be given to the constraints of competing priorities and limited resources.[33]

In assessing the scope of a State's positive operational duties, and whether a State has complied with them, the Court will consider the particular circumstances of the case, including the domestic legality of the authorities' acts or omissions, the domestic decision-making process, including whether the appropriate

[30] For example, those working in certain professions where they are more likely to come into contact with other people and therefore contract Covid-19, e.g. health professionals: See https://bit.ly/3FmxmVe "Which occupations have the highest potential exposure to coronavirus?" Office for National Statistics, 11 May 2020

[31] See https://www.who.int/westernpacific/emergencies/covid-19/information/high-risk-groups "COVID-19: vulnerable and high risk groups", World Health Organization, Western Pacific Region

[32] For example, in Spain, the Royal Decree 463/2020, of 14 March 2020, declared a state of emergency and established an obligation on the health authorities to take immediate and effective measures to protect healthcare professionals throughout the national territory. On 30 March 2020 the National Confederation of Medical Unions in Spain brought a case before the Spanish Supreme Court in which they argued that the Ministry of Health had disregarded these obligations by failing to provide sufficient PPE to nursing staff at the start of the pandemic. The Supreme Court found that, due to the inactivity of the Ministry of Health, health professionals had lacked the necessary means of protection against Covid-19, which represented a serious risk for their health and their fundamental rights to physical and moral integrity. See Tribunal Supremo, Sala de lo Contencioso-Administrativo, judgment of 08.10.2020, no STS 3024/2020.

[33] *Budayeva and Others v. Russia*, judgment of 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (included as a summary in this publication)

investigations and studies have been taken into account, the complexity of the issue, especially where conflicting Convention interests are involved, the origin of the threat, the extent to which the risk is susceptible to mitigation and the extent to which the risk results from a clearly defined threat.[34]

These are some factors which mean it is likely that States would be afforded a wide margin of appreciation regarding their choice of operational measures to prevent deaths resulting from Covid-19. Many of the previous cases in which a breach of the operational duty under Article 2 has been found relate to discrete events, about which States had a clear level of understanding and forewarning. The scope and the ever-developing nature of the Covid-19 pandemic, which relates to the emergence of a new virus, rendered it a more complex risk to respond to. Scientific knowledge and understanding of the causes and impact of Covid-19 continue to develop. At the outbreak of the pandemic, there were few relevant scientific studies available to consult as part of the decision-making process on how to respond. Those studies which were available, or which were produced at the start of the pandemic, did not necessarily identify one definitive response that governments should have taken, and which would have rendered them compliant with their Article 2 obligations.

A State's reason for the failure to provide medical equipment or to take certain measures would also be a relevant consideration.[35] For example, there may be practical, resource constraints resulting from the global demand for similar equipment.

However, even in the context of environmental disasters over which States had no control, the Court has held that States have an obligation to take preventive operational measures to reinforce their capacity to deal with the unexpected and violent nature of such natural phenomena.[36] The unexpected and unpredictable nature of the pandemic may mean States would have a wider

[34] *Budayeva and Others v. Russia*, judgment of 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, §§ 136-137 (included as a summary in this publication); *Kolyadenko and Others v. Russia*, judgment of 28 February 2012, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, § 161.

[35] For example, in the Spanish case Tribunal Supremo, Sala de lo Contencioso-Administrativo, judgment of 08.10.2020, no STS 3024/2020 (see fn 31 above), the Spanish authorities had committed to providing PPE as a known, effective method by which to protect healthcare professionals and their failure to provide such PPE was found to be due to the "inactivity" of the authorities, rather than a lack of resources.

[36] *M. Özel and Others v. Turkey*, judgment of 17 November 2005, nos. 14350/05, 15245/05 and 16051/05, § 173

margin of appreciation regarding how to respond but is not a reason to suggest they have no operational duties under Article 2 at all.

Further, over the course of the pandemic, it became increasingly clear that certain factors, such as avoiding close contact with other people and wearing PPE, would help to reduce the risk of spread of the virus. Operational duties triggered from January 2020 onwards could therefore include an obligation to order personal protective equipment (PPE) and ventilators in advance, to provide protective equipment to workers,[37] or to impose lockdowns or social distancing measures, taking into account the scientific advice available at the time and acting upon this in a timely manner.

The Court has also recognised that vaccination programmes can be a legitimate means of protecting against diseases which may pose a serious risk to health. This refers both to those who receive the vaccinations as well as those who cannot be vaccinated and are thus in a state of vulnerability, relying on the attainment of a high level of vaccination within society at large for protection against the contagious diseases in question.[38] The implementation of a vaccination programme corresponds, therefore, to the aims of the protection of health and the protection of the rights of others and may be one mechanism which falls within the scope of the operational duty to protect people from risk (see also the discussion of vaccination policies in the section of this Guide: Article 8: the right to private and family life).

(iii) Establishing breach of an operational duty

In order to establish a breach of the positive operational obligations under Article 2 it would also be necessary to establish a causal link between the State's failure to take preventive measures and a person's death. It may be difficult to identify when or where exactly a person contracted Covid-19 and so too whether their death could have been avoided if the State had in fact adopted the preventive measure which it failed to take.

[37] See *Brincat v. Malta*, judgment of 24 July 2014, nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, where the Maltese authorities' failure to provide adequate protection to ship workers exposed to asbestos, including adequate protective equipment (face masks), breached Article 2.

[38] *Vavřička and Others v. the Czech Republic*, judgment of 8 April 2021, nos. 47621/13 and 5 others, §272 (included as a summary in this publication)

Operational duties in the context of healthcare

Whilst acts or omissions of the authorities in the field of healthcare policy may engage responsibility as part of the regulatory obligations under Article 2,[39] errors of judgment or 'mere' medical negligence on the part of health staff will not amount to a breach of Article 2.[40] Under Article 2, a State must make adequate provision for securing high professional standards among health professionals and the protection of the lives of patients, but negligent coordination in the treatment of a particular patient is generally insufficient to amount to a breach of Article 2.[41] The Court has held however that an issue may arise under Article 2 where it is shown that the authorities have put an individual's life at risk by denial of access to healthcare which they have undertaken to make available to the population generally.[42]

Otherwise, it is only in certain exceptional circumstances that positive operational duties to protect life arise in the context of healthcare:

i) where life is '*knowingly put in danger by denial of access to life-saving treatment*'; and
ii) where a '*systematic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment, and the authorities knew or ought to have known about this risk and failed to undertake the necessary measures to prevent that risk materializing…*'.[43]

Potential claims against the State for breach of Article 2 in an individual case, in the context of healthcare, may therefore arise if a person dies because they are not given access to lifesaving equipment,[44] in the context of Covid-19 this

[39] *Byrzykowski v. Poland*, judgment of 27 June 2006, no. 11562/05

[40] *Powell v. UK*, admissibility decision of 4 May 2000, no. 45305/99

[41] *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13 (included as a summary in this publication)

[42] *Cyprus v. Turkey*, Grand Chamber judgment of 10 May 2000, no. 25781/94, § 219

[43] *Lopes De Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13, § 192 (included as a summary in this publication)

[44] *Nitecki v. Poland*, admissibility decision of 21 March 2002, no. 65653/ 01 (included as a summary in this publication); *Mehmet Senturk and Bekir Senturk v. Turkey*, judgment of 9 April 2013, no. 13423/09; *Asiye Genc v. Turkey*, judgment of 27 January 2015, no. 24109/07

could include access to a ventilator, fair and equitable access to a vaccination programme,[45] or fair and equitable access to more general health protection measures such as testing or access to PPE, particularly amongst healthcare staff treating vulnerable patients.[46] However, it would need to be demonstrated that the denial or delay in access to this treatment either resulted from gross medical negligence[47] or from a wider systemic or structural failure on the part of the State to undertake the necessary measures to prevent the risk from materialising.[48]

Access to treatment for illnesses other than Covid-19

As part of their efforts to maximise access to lifesaving treatment for Covid-19, and to increase the capacity of medical and other workers to respond to an increase in patients suffering from Covid-19, States closed health services deemed non-essential and postponed appointments made in relation to other illnesses. However, there are concerns that the de-prioritisation of medical treatments and appointments unrelated to Covid-19 may have denied people access to time-sensitive and potentially life-saving services.[49] Some notable examples of this include:

[45] See Sarah Cassella, Professeur de droit public à l'Université du Man "Accès équitable aux vaccins contre la Covid-19 et droit international: les limites de la logique de l'exception de santé publique", https://blog.leclubdesjuristes.com/acces-equitable-aux-vaccins-contre-la-covid-19-et-droit-international-les-limites-de-la-logique-de-lexception-de-sante-publique-par-sarah-cassella/

[46] *Le Mailloux v. France*, decision of 5 November 2020, no. 18108/20 (included as a summary in this publication) where the Court found that if the applicant was ever denied assistance or care in the context of the general health measures that he complained of (a failure to provide mass testing and access to PPE for example), he would be able to contest the compatibility of such refusal with the Convention in the domestic courts.

[47] In *Lopes de Sousa Fernandes v. Portugal* Grand Chamber judgment of 19 December 2017, no. 56080/13, § 194 (included as a summary in this publication) this is defined as acts and omissions of health-care providers that go beyond a mere error or medical negligence, in so far as those health-care providers, in breach of their professional obligations, deny a patient emergency medical treatment despite being fully aware that the person's life is at risk if that treatment is not given.

[48] *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13, §195 (included as a summary in this publication)

[49] See https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31679-2/fulltext "COVID-19 has 'devastating' effect on women and girls" by S.Cousins, The Lancet, Volume 396, Issue 10247, p.301-302, 1 August 2020. See also: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-november_en.pdf, "Coronavirus Pandemic in the EU – Fundamental Rights Implications: Focus on Social Rights", European Union Agency for Fundamental Rights, Bulletin #6, 1 September to 31 October 2020, pages 21-22

i) Missed cancer diagnoses, as reports estimate that cancer diagnoses decreased during the pandemic and that the reordering and reduction of healthcare services may also lead to an increase in mortality rates from the disease in the future.[50]

ii) A reduction in access to maternal, abortion and contraceptive health care services due to restrictions on movement and the reassignment of staff typically working in these areas, particularly in countries where women's sexual and reproductive healthcare was deemed 'non-essential'.[51]

When making decisions and implementing policies to protect people against the threat to lives posed by Covid-19, States must also be alive to their obligations under Article 2 to provide access to lifesaving treatment for other illnesses. These obligations should be factored into the decision-making process regarding which health care services should remain open and which can be temporarily postponed. The definition of 'essential care' used by States to determine which treatments must continue should be drawn wide enough to ensure compliance with the obligations under Article 2 described above in relation to other life-threatening diseases.

Obligations to protect individuals from self-harm (operational and regulatory obligations)

There are rising concerns about an increase in self-harm or suicidal ideation during the pandemic resulting from factors such as fear, isolation, physical distancing, a reduction in access to support services, loss of earnings, closure of businesses, and a high level of exposure to those suffering from Covid-19 amongst frontline workers.[52] Concerns about a general deterioration in mental health

[50] See https://cancerworld.net/spotlight-on/unexpected-consequences-of-the-covid-19-pandemics-on-cancer-patients/ "Consequences of the COVID-19 pandemic on cancer patients" by C.Ferrario, Cancer World, 21 May 2020.

[51] See https://www.coe.int/en/web/commissioner/-/covid-19-ensure-women-s-access-to-sexual-and-reproductive-health-and-rights "COVID-19: Ensure women's access to sexual and reproductive health and rights", Statement of the Council of Europe, 7 May 2020; See also https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31679-2/fulltext "COVID-19 has 'devastating' effect on women and girls" by S.Cousins, The Lancet, Volume 396, Issue 10247, p.301-302, 1 August 2020.

[52] See https://www.thelancet.com/journals/lanpsy/article/PIIS2215-0366(20)30171-1/fulltext "Suicide risk and prevention during the COVID-19 pandemic" D. Gunnell et al, The Lancet, Volume 7, Issue 6, p.468-471, 1 June 2020.

during the pandemic, and in particular amongst those who are kept in medical isolation, are also discussed in the sections on Article 3 (Protection from inhuman and degrading treatment) and Article 8 (Right to respect for private and family life) within this publication. These concerns may become more pressing as the pandemic has longer-term effects on the general population, the economy, and vulnerable groups.

Regulatory Obligations

More generally, a State's regulatory obligations to establish a framework of laws and regulations to protect life, discussed above, should include measures to protect mental health, given the increased risk of self-harm and suicidal ideation caused by a deterioration in mental health during a pandemic. This might include adapting the framework of laws regulating access to mental health support services to ensure that support remains accessible to those in isolation or quarantine (for example adapting services to be provided over the phone) and to make support services more widely available.

Operational Obligations

In certain circumstances Article 2 may imply a positive obligation on the part of the authorities to take preventive operational measures to protect an individual from himself or herself.[53] Persons with mental disabilities are considered to constitute a particularly vulnerable group who require protection from self-harm.[54] For a positive operational obligation to arise where the risk to a person derives from self-harm it must be established that:

i) the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual; and
ii) if so, that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[55]

[53] *Renolde v. France*, judgment of 16 October 2008, no. 5608/05, § 81. See also Aleydis Nisen "*A Right to Access to Emergency Health Care: The European Court of Human Rights Pushes the Envelope*" Medical Law Review (Oxford University Press), Vol. 26 No. 4 | 2018 pp 693-702. First published online on 11 December 2017: https://doi.org/10.1093/medlaw/fwx059.

[54] *Renolde v. France*, mentioned above, § 84

[55] *Fernandes de Oliveira v. Portugal*, Grand Chamber judgment of 31 January 2019, no. 78103/14, §110 - § 115

The duty to take preventive operational measures in this respect has so far mainly arisen in the context of suicides in detention in custody or in prison, compulsory military service[56] or in voluntary/involuntary psychiatric care.[57] However, such duties have also arisen outside spaces of detention, and will apply in a situation where an individual threatens to take his or her own life in plain view of State agents and where this threat is an emotional reaction directly induced by the actions or demands of State agents, regardless of how unexpected that threat might have been.[58]

In the context of the Covid-19 pandemic, an obligation may arise under Article 2 to intervene to the extent reasonable to try to avoid a risk of self-harm where:

i) the authorities are made aware of a significant deterioration in a person's mental health; and
ii) the deterioration is caused by the measures taken by the State to combat the spread of Covid-19; and
iii) there is a real and immediate threat of self-harm.

Domestic Abuse (operational and regulatory obligations)

There is a general, documented, trend that violence increases in humanitarian situations, including those related to epidemics and pandemics.[59] During the Covid-19 pandemic, frustration related to health risks, economic losses, unemployment, uncertainty, lockdowns and restrictions on movement increased violence against women.[60] In response to the pandemic, services for the protection from and prevention of domestic abuse such as shelters, safehouses,

[56] *Kılınç and Others v. Turkey*, judgment of 28 March 2000, no. 22492/93

[57] *Fernandes de Oliveira v. Portugal*, Grand Chamber judgment of 31 January 2019, no. 78103/14

[58] See *Mikayil Mammadov v. Azerbaijan*, judgment of 17 December 2009, no. 4762/05, § 115, where the applicant's wife set herself on fire in protest at a forced eviction.

[59] See https://digitallibrary.un.org/record/822489?ln=en "Protecting Humanity from Future Health Crises", Report of the High Level UN Panel on the Global Response to Health Crises", 9 February 2016

[60] See https://www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/2020/05/unw_covid-vaw_report_final.pdf?la=en&vs=5317 "Impact of the COVID-19 pandemic on specialist services for victims and survivors of violence in the Western Balkans and Turkey", United Nations Women, May 2020; https://balkaninsight.com/2020/04/21/covid-19-and-domestic-abuse-when-home-is-not-the-safest-place/ "COVID-19 and Domestic Abuse: When Home is not the Safest Place", X. Bami and others, Balkan Insight news, 21 April 2020

rape crisis centres, and counselling services were forced to close, or to reduce the nature of the services they provide.

Similar problems exist in the context of child maltreatment. For children who are already experiencing abuse or neglect by household members, confinement at home meant prolonged exposure to potential harm. Additionally, children may receive less protection within their home if their parents are overburdened, and standards of supervision may have fallen; they may be more susceptible to grooming if they feel lonely or uncared for; and will almost certainly have reduced access to protection from trusted adults outside the home.[61]

Where the time and resources of the police, social services and courts were stretched by other responsibilities during the pandemic, responding to situations of domestic abuse were dealt with as less of a priority.[62] A focus on policing restrictions on movement has led authorities to de-prioritise other areas of law enforcement and the closure of courts led to delays in prosecutions for cases which are not deemed urgent, including cases of gender based violence.[63] This led to a situation in which violence was more likely to be perpetrated, but in which the options for escaping from this violence and the efficacy of reporting it to the authorities were reduced.

Domestic abuse raises issues under Articles 2, 3, 8 and 14 of the Convention. This section of the publication should be read in conjunction with the sections within this publication dealing with the obligations under Articles 3 (Protection from inhuman and degrading treatment), 8 (Right to respect for private and family life) and 14 (Freedom from discrimination) in respect of domestic abuse.

[61] See https://learning.nspcc.org.uk/media/2246/isolated-and-struggling-social-isolation-risk-child-maltreatment-lockdown-and-beyond.pdf "Isolated and struggling: social isolation and the risk of child maltreatment, in lockdown and beyond", E.Romanou and E.Belton, NSPCC Evidence team, June 2020

[62] For example where survivors of domestic violence needed movement assistance, but the police were not able to provide this as they were overwhelmed with the crisis: https://eca.unwomen.org/en/news/stories/2020/4/unpacking-the-impact-of-covid-19-on-women-and-girls-in-albania?fbclid=IwAR1sq-JRW4c4UUMgD8WtkRUB9YaoeClvHCr7LULByvopNpyM4QrjjMVOCr0 "Unpacking the impact of COVID-19 on women and girls in Albania", UN Women Albania, 28 April 2020

[63] See https://trialinternational.org/wp-content/uploads/2020/05/Justice-in-the-time-of-coronavirus_EN_final.pdf "Justice in the time of coronavirus: How a global pandemic affects victims of the gravest crimes", Report of Trial International, May 2020

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) is another key document in this area. By ratifying the Istanbul Convention,[64] Western Balkan States committed to taking the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of the Istanbul Convention that are perpetrated by non-State actors. The Court has begun to use the Istanbul Convention as a key instrument to interpret the extent of the positive obligations owed to victims of domestic and gender-based violence under Articles 2, 3 and 8 of the ECHR.[65]

Regulatory Obligations

The regulatory obligations to protect life described above include an obligation to establish a legal framework which prohibits and prevents the taking of a human life by the criminal acts of a private individual. This includes prohibiting domestic violence by establishing appropriate laws, including a criminal law framework to ensure allegations of domestic violence are investigated, prosecuted and punished in a manner proportionate to the seriousness of the offences committed.[66]

Operational Obligations

The operational obligations to take preventive measures to protect life described above also include an obligation to protect life from the acts of a private individual in certain situations.

In the context of domestic violence, States are under an obligation to prevent the infliction of domestic violence upon victims and to investigate allegations of domestic violence in a prompt and effective manner. In a domestic violence case, a State will be in violation of Article 2 where the authorities fail to adequately

[64] 34 countries have ratified the Istanbul Convention so far, including Albania, Bosnia and Herzegovina, Montenegro, Croatia, Serbia and North Macedonia.

[65] See *Bălșan v. Romania*, judgment of 23 May 2017, no. 49645/09 112 and *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14

[66] *Kontrová v. Slovakia*, judgment of 31 May 2007, no 7510/04; *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication); *Branko Tomašić and others v. Croatia*, judgment of 15 January 2009, no 46598/06

protect an individual from the actions of a private person[67] where they were aware that a serious risk was present.[68]

The requirements of a prompt investigation into allegations of abuse and effective investigations into and prosecutions of incidents of domestic violence were particularly pertinent in the context of the Covid-19 pandemic, where the time and resources of the police, social services and courts were stretched by other responsibilities and where there have been delays in criminal investigations, prosecutions and court proceedings. States will be in breach of Article 2 where a situation of domestic violence is brought to their attention, but the authorities fail to respond, and their ineffective response to the allegations leads to the death of an individual.[69] States were required therefore to ensure that effective investigations into allegations of domestic abuse continued to be dealt with as a priority area throughout the pandemic.

Social Support

Resources should continue to be allocated to investigations of abuse and to the provision of support to victims. The Court has held that in particular circumstances the State has a duty to provide resources to individuals to prevent violations of their rights[70] but has not specifically addressed the necessity for States to ensure that victims are provided with social support measures, such as refuge accommodation and financial support.

[67] *Osman v. United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94 (included as a summary in this publication); *Kontrová v. Slovakia*, judgment of 31 May 2007, no 7510/04; *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication); *Branko Tomašić and others v. Croatia*, judgment of 15 January 2009, no 46598/06, §50

[68] *Valiuliene v. Lithuania*, judgment of 26 March 2013, no. 33234/07

[69] See *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14, where the applicant filed a complaint against her abusive husband and requested protection orders against him after several episodes of violence against her and their children. The police questioned the applicant for the first time seven months after her complaint and subsequently, an episode of violent abuse resulted in the death of their son. The Court found a violation of Article 14 in conjunction with Articles 2 and 3, confirming that discrimination occurs not only when acts of the authorities amount to a failure to respond to episodes of violence, but also when the State has demonstrated a 'repeated tolerance' that 'reflect[s] a discriminatory attitude towards [the] applicant as woman.'

[70] *Airey v Ireland*, judgment of 9 October 1979, no. 6289/73

The Istanbul Convention however does place an obligation on the State to ensure that the necessary legislative, or other, measures are put in place to provide or arrange for, in an adequate geographical distribution, immediate, short and long-term specialist support services to any victim subjected to any of the acts of violence covered by the scope of the Istanbul Convention. Parties are also required to 'take the necessary legislative or other measures to provide for the setting-up of appropriate, easily accessible shelters in sufficient numbers to provide safe accommodation for and to reach out pro-actively to victims, especially women and their children.'

Closing shelters, safehouses and other support services may be classed as a measure to protect lives and health from the spread of Covid-19. However, States needed to assess whether the risk to life posed by Covid-19 necessitated a blanket closure of such services or whether they could have been adapted to remain open, taking into account the fact that such services can also serve to protect the right to life, where used to house a person at risk of experiencing a life threatening situation of domestic violence.

Duties to protect the life of those detained by the State or in State care (operational and regulatory obligations)

The State also has a duty to ensure that those who are deprived of their liberty, including in prison, detention centres, psychiatric hospitals and social care facilities, are provided with the requisite medical assistance so as to secure a person's health and well-being.[71] State authorities must ensure that treatment is adequate, which means that diagnoses and care are prompt and accurate, and that where necessitated, supervision of a medical condition is regular, systematic and involves a comprehensive therapeutic strategy aimed at curing the detainee's diseases or preventing their aggravation.[72]

The Court has adopted a similar approach in respect of the medical treatment of vulnerable persons under the care of the State when the domestic authorities,

[71] *Salman v. Turkey*, Grand Chamber judgment of 27 June 2000, no. 21986/93, § 99; *Slimani v. France*, judgment of 27 July 2004, no. 57671/00; *Tanli v. Turkey*, judgment of 10 April 2001, no. 26129/95, § 141; *Kişmir v. Turkey*, judgment of 31 May 2005, no. 27306/95, § 105; *Mojsiejew v. Poland*, judgment of 24 March 2009, no.11818/02, § 65

[72] For the meaning of the adequacy of treatment of the persons under the authorities' control see mutatis mutandis, *Rooman v. Belgium*, Grand Chamber judgment of 31 January 2019, no. 18052/11, § 147

despite being aware of the conditions that led to the death of persons placed in social care homes or hospitals, had nonetheless unreasonably put the lives of these people in danger.[73] This may be relevant to government policies regarding the discharge of patients from hospital into care homes, or the timing of decisions to lockdown care homes, where such decisions were followed by a spread of Covid-19 amongst elderly residents, known to be particularly vulnerable to the virus.[74]

States also have a positive obligation to prevent the spread of contagious disease in places of detention. However, the Convention cannot be construed as laying down a general obligation to release detainees on health grounds.[75] Certain States have announced policies to release prisoners early or temporarily, but such a policy is not required by existing case law. It may however be the only way to protect life, whilst avoiding a breach of Article 3 if the alternative means of protecting life is to keep prisoners in solitary confinement.[76]

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[73] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Grand Chamber judgment of 17 July 2004, no. 47848/08, §§ 131 and 143-144 (included as a summary in this publication); *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, §§ 36-41; *G.N. and Others v. Italy*, judgment of 1 December 2009, no. 43134/05; *Hristozov and Others v. Bulgaria*, judgment of 3 November 2012, nos. 47039/11 and 358/12 (included as a summary in this publication); *Oyal v. Turkey*, judgment of 23 March 2010, no. 4864/05 (included as a summary in this publication)

[74] See for example in the United Kingdom, where the rapid discharge of patients from hospital to care homes has been found to have had tragic consequences: https://www.adass.org.uk/media/7967/adass-coronavirus-survey-report-2020-no-embargo.pdf "ADASS: Coronavirus Survey", Association of Directors of Adult Social Services, 2020; see also: https://www.ecdc.europa.eu/en/publications-data/covid-19-care-homes-infographic "Infographic: COVID-19 in care homes", European Centre for Disease Prevention and Control, 19 May 2020. See also: https://www.amnesty.org/en/documents/eur45/3152/2020/en/ "United Kingdom: As if expendable: The UK government's failure to protect older people in care homes during the COVID-19 pandemic", Amnesty International Report, 4 October 2020, in which Amnesty International concludes that the UK government's response to Covid-19 violated care home residents' right to life, right to health, and their right to non-discrimination and may also have impacted on their rights to private and family life, and their right not to be subject to inhuman or degrading treatment. Failures leading to this conclusion included the issuance of guidance that "no PPE was required above and beyond normal good hygiene practices" and government efforts to encourage the transfer of patients from hospitals to care homes without the requirement of a negative test.

[75] *Dzieciak v. Poland*, judgment of 9 December 2008, no. 77766/01

[76] For further discussion on the issues that might arise under Article 3 in places of detention, see the section on Article 3 (Protection from inhuman and degrading treatment) within this publication, in particular "Obligations to protect the health and well-being of those for whom the State assumes responsibility"

b. Procedural investigative duties

Article 2 contains a distinct procedural obligation to carry out an effective investigation into the death of an individual in circumstances where there is a suspected breach of a State's substantive duties under Article 2. A breach of this procedural obligation can lead to a separate finding of a violation of Article 2 either in addition to or without the need for a violation of the substantive duties under Article 2. Investigative duties arise in relation to a potential breach of all the obligations discussed above i.e. in the context of deaths caused by Covid-19, other illnesses, self-harm, domestic violence and deaths of those detained by the State or in State care.

Purpose of the investigative duty

The purpose of the investigative duty is to ensure that domestic laws safeguarding the right to life are implemented effectively and that State authorities are held accountable for deaths which occur under their responsibility.[77] Lessons should be learned from previous mistakes to prevent further deaths occurring in similar circumstances, to alleviate public concerns and to provide the bereaved with an opportunity to understand how their relative has died, to have the satisfaction, at least, of knowing that lessons learned will make such deaths less likely in future.

Given the discussion above regarding the ways in which States' responses to the pandemic could be argued to have breached their substantive duties under Article 2, it is likely that the investigative duty will be triggered across many States to ensure governments are held to account for the decisions taken and policies implemented to protect the lives of citizens from the threat of Covid-19.

The Court has highlighted the requirement for a prompt examination of cases concerning deaths in a hospital setting, so that the facts and possible errors committed in the course of medical care can be established promptly and be disseminated to medical staff to prevent the repetition of similar errors and thereby contribute to the safety of users of all health services.[78] The risk of a 'second-wave' of the virus heightened this need for effective investigations to happen promptly to ensure governments are better equipped to respond to any future waves.

[77] *Al Skeini v. United Kingdom*, Grand Chamber judgment of 7 July 2011, no. 55721/07, §163

[78] *Byrzykowski v. Poland*, judgment of 27 June 2006, no. 11562/05, §117

Scope of the investigative duty

The exact nature and scope of the investigative duty depends on the circumstances of a particular case, but as a minimum an investigation must be effective, which means it must be capable of establishing the facts, identifying those responsible and if appropriate imposing an appropriate punishment or form of redress. Essentially it must be capable of achieving the purposes of the duty described above, this being an obligation of means, not of result. The investigation must be commenced by the State authorities and the State must take whatever steps they can to gather relevant evidence. The investigation must be conducted by an independent body, be accessible to the victim's family, be carried out reasonably expeditiously and there must be a sufficient element of public scrutiny of the investigation.[79]

Ordinarily the investigative duty under Article 2 may be discharged by holding an inquest or a public inquiry or by launching a civil or criminal investigation into a person's death, all of which can take place in a public court, to ensure the requirements of public scrutiny and accessibility to the bereaved are met. However, the context of Covid-19 posed challenges to the ordinary ways in which this duty was carried out and States may need to be more creative in their approaches to ensure these minimum procedural requirements are met. For example, during the pandemic, the attendance of the public, juries and family members at public hearings was not possible due to lockdown and social distancing requirements. Video hearings or the publication or reports may instead be necessary.[80]

Investigating a potential breach of an operational duty

Since the State has direct responsibility for the welfare of persons deprived of their liberty, where such a person dies as a result of a health problem, the State must offer an explanation as to the cause of death and the treatment administered to the person concerned prior to their death.[81] This duty may ordinarily be discharged on a case-by-case basis at individual inquests. However, in the context of Covid-19, deaths in State care may be inextricably linked to wider systemic

[79] *Armani Da Silva v. United Kingdom*, Grand Chamber judgment 30 March 2016, no. 5878/08 at §§232-237

[80] For a more detailed discussion of the issues with regards to holding a hearing during the pandemic, see the section on Article 6 (Right to a fair hearing) within this publication.

[81] *Slimani v. France*, judgment of 27 July 2004, no. 57671/00, § 27; *Kats and Others v. Ukraine*, judgment of 18 December 2008, no. 29971/04, §104

operational and/or regulatory mistakes, such as a failure to provide sufficient PPE to staff working with those in detention, or a failure to order such equipment in a timely manner. To be compliant with Article 2, any investigation(s) launched must not ignore any potential breach of a State's wider policy decisions or regulatory duties, where relevant.

Individual inquests may not suffice to meet the requirements of Article 2, if they are insufficiently resourced / structured to enable proper consideration of the systemic or regulatory failures which may have contributed to a person's death. Further, a vast number of deaths resulting from Covid-19 may not be referred for individual consideration at an inquest, if the death is deemed to result from the natural progression of the virus and does not fall within the exceptional categories described above in which an operational duty might arise.[82] States must therefore ensure there is a properly resourced forum in which to investigate wider, national regulatory and structural errors.

Investigating a potential breach of a regulatory duty

Holding a public inquiry is the most common method by which investigations are carried out into wider policy errors and structural mistakes. However, they sometimes last for months or years and may commence months after the relevant event. It may therefore be some time before the conclusions of a full public inquiry (in its ordinary form) are delivered, to assist with understanding what exactly what went wrong and where deaths could have been avoided.

In June 2020 France became the first nation to announce it would hold a public inquiry into its response to Covid-19 after complaints were filed over alleged failures to put in place antivirus protections at the workplace, to provide face masks and to carry out mass testing.[83] Elsewhere, the Government of the

[82] See for example the Chief Coroner's Guidance in the United Kingdom advising Coroner's Inquests not to take account of wider policy decisions: https://www.judiciary.uk/wp-content/uploads/2020/04/Chief-Coroners-Guidance-No-37-28.04.20.pdf "COVID-19 deaths and possible exposure in the workplace" HHJ Mark Lucraft QC, Chief Coroner, 28 April 2020; and the response from the lawyers and medical practitioners expressing concern that this guidance did not comply with Article 2: https://www.bmj.com/content/369/bmj.m1806 "COVID-19: Coroners needn't investigate PPE policy failures in deaths of NHS staff" by C. Dyer, BMJ, 369:m1806, 4 May 2020

[83] See https://www.thenational.ae/world/europe/coronavirus-france-sets-out-first-public-inquiry-into-handling-of-pandemic-1.1031304 "Coronavirus: France sets out first public inquiry into the handling of the pandemic",

United Kingdom resisted persistent calls from bereaved families to launch a public inquiry immediately, arguing it would be too costly and time-consuming a process, distracting from efforts to tackle the virus.[84] It was only in May 2021 that the United Kingdom government announced it would hold a public inquiry into its handling of the pandemic, and the first public hearings are not expected to begin until 2023.[85] If a whole scale public inquiry is deemed too costly and time consuming, or if it would not meet the requirement for promptness under Article 2, States must develop alternative methods to scrutinise the potential operational and regulatory failures in their response to Covid-19. This may involve adapting the way in which a public inquiry is ordinarily carried out, to ensure some form of investigation takes place as soon as possible and that lessons learned can be incorporated into the ongoing response to the pandemic.

by T.Harding, The National, 9 June 2020

[84] See https://www.theguardian.com/world/2020/jun/12/bereaved-relatives-call-for-immediate-inquiry-into-covid-19-crisis "Bereaved relatives call for immediate inquiry into COVID-19 crisis" by D.Conn, The Guardian, 12 June 2020. Arguments were made that an inquiry should be held to investigate issues such as: the timing of the United Kingdom lockdown on 23 March, which was later than almost all European countries; the state of the government stockpile of personal protective equipment and testing capacity; the disproportionately high number of black and minority ethnic people who have died from Covid-19; and the transfer of patients from hospitals to care homes.

[85] https://covid19.public-inquiry.uk/ the terms of reference setting out the questions the inquiry will address are available here: https://covid19.public-inquiry.uk/uk-covid-19-inquiry-terms-of-reference-2/

2. Article 3 – Protection from inhuman and degrading treatment

Article 3 of the Convention is absolute in its prohibition of torture and inhuman or degrading treatment, it is a non-derogable right, and there are no permitted interferences with the right. Suffering and illness may constitute inhuman and degrading treatment within the scope of Article 3 of the Convention, if it reaches a certain level of severity. There is no strict rule to define exactly what kind of treatment meets this required level of severity and a determination of this question can depend on all the circumstances of a case, including the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[86]

Generally, however, treatment will be deemed inhuman if it causes intense mental or physical suffering and will be deemed degrading if it provokes feelings of fear, anguish and inferiority capable of humiliating and debasing a person and possibly of breaking their physical or moral resistance.[87] Article 3 provides:

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

Article 3 does not impose an obligation on the State to provide a general level of medical care to the general population to prevent them from suffering, but it does require States to provide medical assistance to those for whom it assumes responsibility, for example those who are deprived of their liberty.[88] There is a risk that those in places of detention (such as prisons and immigration removal

[86] *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88; *Feilazoo v. Malta*, judgment of 11 June 2021, no. 6865/19 (included as a summary in this publication), where the Court found a breach of Article 3 based on all the circumstances of the applicant's detention, including the fact that he was detained in living quarters with people who could have contracted Covid-19, but also taking account of his vulnerability as an asylum seeker, the length of his detention, insect infestations in the dormitories, his placement in isolation for a period without access to natural light, ventilation or exercise.

[87] *Ireland v. the United Kingdom*, judgment of 18 January 1978, no. 5310/71

[88] *Kudla v. Poland*, Grand Chamber judgment of 26 October 2000, no. 30210/96, § 94. See also rule 24.1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

centres) or those living in institutions with multiple occupants (such as care homes for the elderly and for children, hospitals and boarding schools for children with special educational needs) may be more likely to contract Covid-19, as a result of the more crowded conditions in which they reside.

Whilst States are obliged to prevent the spread of infectious disease in places of detention, they must also ensure that the protective measures implemented to prevent the spread of Covid-19 do not themselves amount to inhuman or degrading treatment. For example, placing prisoners in isolation, placing institutions such as care homes in lockdown (and thereby preventing any visits) or requiring individuals to quarantine for lengthy periods of time may protect people from Covid-19, but may also impact their mental health to an extent that Article 3 is engaged in this respect.

a. Positive obligations to protect individuals from inhuman and degrading treatment

Obligations to protect the health and well-being of those for whom the State assumes responsibility

Article 3 imposes an obligation on the State to adequately protect the health and well-being of people for whom the State assumes responsibility.[89] This includes those detained in prisons, detention centres and psychiatric hospitals and those residing in care homes.[90] In the context of the Covid-19 pandemic, it would also include those who were required to quarantine or remain in lockdown conditions to the extent that the restrictions on their movement constitute a deprivation of liberty.[91] The standard of care provided to those in detention should be compatible with the human dignity of a detainee. This means providing medical treatment and conditions of detention which are adequate, and which correspond to the particular needs of a detainee, including the nature of their health condition, age, sex and any other vulnerabilities.[92]

[89] *Khudobin v. Russia*, judgment of 26 October 2006, no. 59896/00 (included as a summary in this publication)

[90] See: https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)651976 "Coronavirus and prisons in the EU Member-State measures to reduce spread of the virus", Carmen-Cristina Cîrlig, Katrien Luyten, Micaela del Monte, Sofija Voronova European Parliamentary Research Service, PE 651.976 – June 2020.

[91] For a discussion on what constitutes a deprivation of liberty, see the section on Article 5 (Right to liberty) within this publication, in particular subsection (a) "Scope".

[92] In *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06, § 137, the Court indicated

The mere fact that a detainee has been seen by a doctor and prescribed treatment does not necessarily mean that care has been adequate under Article 3.[93] National authorities must ensure that diagnosis and care in the facilities for which they are responsible are prompt, accurate and tailored to the nature of a person's condition. For example, State authorities might be required to implement systematic follow up care appointments, or a comprehensive therapeutic strategy aimed at ensuring a patient's recovery, or at least avoiding a deterioration in their condition.[94]

Medical treatment provided should be at a level comparable to that which the State authorities have committed to provide to the population as a whole and must be conducted and monitored by qualified staff.[95] However, this does not mean that every detainee must be guaranteed the level of medical treatment that is available in the best health establishments outside the place of detention. The Court has reserved flexibility to define the standard of health care required under Article 3 on a case-by-case basis, taking into account "the practical demands of imprisonment"[96] and the need to assess competing priorities when allocating limited State resources.[97] The Court will also examine whether the authorities

that "*…the "adequacy" of medical assistance remains the most difficult element to determine. The Court reiterates that the mere fact that a detainee is 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 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 …*". See also *Strazimiri v. Albania*, 2020, judgment of 21 January 2020, no. 24602/16 (included as a summary in this publication)

[93] *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06; *Strazimiri v. Albania*, 2020, judgment of 21 January 2020, no. 24602/16 (included as a summary in this publication)

[94] *Murray v. the Netherlands*, Grand Chamber judgment of 26 April 2016, no. 10511/10, § 106; *Pitalev v. Russia*, judgment of 30 July 2009, no. 34393/03, § 54.

[95] *Bamouhammad v. Belgique*, 17 November 2015, no. 47687/13

[96] *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06, § 137; *Aleksanyan v. Russia*, judgment of 22 December 2008, no. 46468/06, §140; *Patranin v. Russia*, judgment of 23 July 2015, no. 12983/14, § 69.

[97] *Pentiacova and Others v. Moldova*, admissibility decision of 4 January 2005, no. 14462/03 (included as a summary in this publication)

followed the medical advice and recommendations on how to care for a detainee, which were available to them,[98] including the prompt transfer from a place of detention to medical facilities, where the health conditions of the detainees so demand.[99]

Infectious diseases

The Court has stressed that the spread of transmissible diseases should be a public health concern, especially in the prison environment. The requirements on States with regard to the health of those for whom they assume responsibility can therefore differ depending on whether or not they are dealing with a disease that is transmissible.[100] Article 3 imposes an obligation on States to take legislative and administrative measures to eradicate or prevent the spread of contagious diseases in places of detention, where the threat to health posed by the disease would cause a level of suffering severe enough to fall within the scope of Articles 2 or 3.[101] Measures might include introducing a screening system upon entry to a place of detention. The requirement to provide a diagnosis and access to treatment promptly will also be heightened.[102]

The requirements in the case law to prevent the spread of infectious diseases in places of detention which are discussed above and below have largely arisen

[98] *Vladimir Vasilyev v. Russia*, admissibility decision of 1 July 2010, no. 28370/05 §59; *Centre of Legal Resources on behalf of Valentin Câmpeanu v. Romania* Grand Chamber judgment of 17 July 2004, no. 47848/08 (included as a summary in this publication).

[99] *Raffay Taddei v. France*, 21 December 2010, no. 36435/07

[100] *Cătălin Eugen Micu v. Romania*, judgment of 5 January 2016, no. 55104/13, § 56.

[101] See *Poghosyan v. Georgia*, judgment of 29 June 2017, no. 33323/08; see also *Ghavtadze v. Georgia*, judgment of 3 March 2009, no. 23204/07 (included as a summary in this publication), where the Court required the Georgian authorities to take the necessary legislative and administrative measures to prevent the spreading of contagious diseases in prisons, such as tuberculosis and hepatitis; see also *Shelley v. United Kingdom*, admissibility decision of 4 December 2008, no. 23800/06 (included as a summary in this publication).

[102] See *Cătălin Eugen Micu v. Romania*, judgment of 5 January 2016, no. 55104/13, § 56 where the Court considered it desirable that, with their consent, detainees had access, within a reasonable time after their admission to prison, to free screening tests for hepatitis and HIV/Aids; see also *Jeladze v. Georgia*, judgment of 18 December 2012, no. 1871/08, § 44, where the Court held that a three-year delay before submitting the applicant to screening for hepatitis C amounted to negligence on the part of the State in respect of its general obligations to take effective measures to prevent the transmission of hepatitis C or other transmissible diseases in prison.

in the context of preventing the spread of HIV, tuberculosis and hepatitis.[103] However, the obligations which have arisen previously are echoed in the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)'s Statement of Principles relating to the treatment of persons deprived of their liberty in the context of the Covid-19 pandemic (the CPT Statement of Principles).[104] The CPT Statement of Principles reinforces the need to pay special attention to the specific needs of detained persons with particular regard to vulnerable groups and/or at-risk groups, such as older persons and persons with pre-existing medical conditions. Authorities are advised to introduce screening for Covid-19 and to ensure access to intensive care units or transfers to hospitals where required.

To argue that conditions of detention breach, or engage, Article 3 it is necessary to show that a detainee is subject to a "specific risk" of infection with Covid-19.[105] The measures taken by the authorities to prevent the spread or risk of infection within a place of detention are relevant to determining whether Article 3 is engaged in this respect. For example, where two prisoners were subjected to forced hospitalisation during the pandemic, the Court took account of the adoption of the following measures to find that the prisoners were not subject to a specific risk of contracting Covid-19, meaning that Article 3 was not engaged:[106]

[103] At the time of writing, a number of further cases are pending before the Court concerning the compliance with Article 3 of conditions of detention during the pandemic. This includes *Vlamis and Others v. Greece*, case communicated on 16 April 2021, no. 29655/20 and *Riela v. Italy*, case communicated on 5 May 2021, no. 17378/20 which raise the question of whether the authorities took adequate measures to protect the health of the applicants who were in prison during the pandemic and *Rus v. Romania*, case communicated on 11 June 2021, no. 2621/21 which raises the question of whether the fact that the applicant contracted Covid-19 in prison violated his Article 3 rights.

[104] See https://rm.coe.int/16809cfa4b "Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic", European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Council of Europe CPT/Inf(2020)13, 20 March 2020.

[105] *Ünsal and Timtik v. Turkey*, decision of 8 June 2021, no. 36331/20, §38

[106] *Ünsal and Timtik v. Turkey*, decision of 8 June 2021, no. 36331/20. The applicants, who had been forcibly hospitalised after undergoing a hunger strike in prison, complained of being held in detention in hospitals used to treat Covid-19 patients, and considered themselves particularly at risk due to their fragile state of health caused by their hunger strike. However, the Court found their application inadmissible, taking account of the nature of the buildings and rooms in which they were held, and the measures taken by the authorities to prevent infection. For example, relatives and the applicants' lawyers could only enter a room with the applicants after going through

- The requirement for officers, visitors and anyone else coming into contact with a detainee to wear masks and gloves, and to maintain physical distance from the detainee.
- The implementation of disinfection procedures in respect of anyone entering the place of detention.
- The requirement to show a negative Covid-19 test result before entering a place of detention to visit a detainee.
- The nature of the buildings and rooms in which the detainee was held. Detention in a private room, with windows and private washing facilities, is less likely to engage Article 3 than detention in a shared room, for example.

Social distancing, medical isolation and solitary confinement

Detaining an applicant with a serious and highly infectious disease in a shared cell or overcrowded conditions may constitute a breach of Article 3.[107] Additionally, detaining an individual who does not have Covid-19 in living quarters with people who could have contracted Covid-19 may also constitute a breach of Article 3.[108] If there is no need for a person to be placed in Covid-19 quarantine, for example if it is known that they do not have Covid-19, the fact that they are detained in close contact with people who "could" pose a risk to their health (for example because they have not been tested for Covid-19) can suffice to constitute a breach of Article 3, as such conditions would not comply with basic sanitary and hygiene requirements that are relevant to an assessment of compliance with Article 3.[109]

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the required disinfection procedure and had to maintain social distancing, make no physical contact and wear a mask and gloves. Further, the hospital had a capacity of 695 beds and 139 intensive care beds in five buildings, and only one of these buildings was dedicated to Covid-19 treatment.

[107] See *Kotsaftis v. Greece*, judgment 12 June 2008, no. 39780/06, §§ 51-61 where the Court found it 'deplorable' that the applicant, who was suffering from a serious and highly infectious disease, had been detained along with ten other prisoners in an overcrowded cell.

[108] *Feilazoo v. Malta*, judgment of 11 June 2021, no. 6865/19 (included as a summary in this publication), where the applicant was moved from isolation within an immigration detention centre to Covid-19 quarantine in living quarters with new arrivals who had not been tested for Covid-19. The Court found a breach of Article 3 and his detention for several weeks alongside people who had not been tested for Covid-19 and so who could have posed a risk to his health, was found not to comply with "basic sanitary requirements", see §92

[109] *Feilazoo v. Malta*, judgment of 11 June 2021, no. 6865/19, §92 (included as a summary in this publication),

CPT guidance advises that it is imperative that concerted efforts should be made by all relevant authorities to use alternatives to deprivation of liberty to reduce overcrowding in places of detention. The CPT Statement of Principles suggests making greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassessing the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate, and refraining, to the maximum extent possible, from detaining migrants. The Commissioner for Human Rights has also called on States to release people from immigration detention to the maximum extent possible to protect the rights of those deprived of their liberty from the spread of Covid-19.[110] A significant number of States did adopt measures to reduce their prison population during the pandemic, for example, between mid-March and mid-May 2020, France reduced its prison population by 13,082 and in Germany, several states released prisoners in the last stages of their prison sentences for minor criminal offences.[111] Overall, in Europe, prison density fell by 5.3% from January 2020 to January 2021, including a fall of 24.4% in Montenegro and a fall of 9.7% in Albania.[112] This trend across States may be relevant to an assessment of whether prisoners' continued detention was necessary and / or proportionate in States where they were not released.

Where release from detention is not deemed possible or appropriate, States should ensure that it is possible for a person who tests positive for Covid-19 to isolate away from other detainees in conditions which are compatible with Article 3.[113] Medical isolation, solitary confinement, or prohibition of contact with other prisoners for security, disciplinary or protective reasons does not automatically breach Article 3.[114] Whether such measures fall within the ambit of Article 3

[110] See https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-release-of-immigration-detainees-while-covid-19-crisis-continues "Commissioner calls for release of immigration detainees while Covid-19 crisis continues", Statement from the Commissioner for Human Rights, Council of Europe, 26 March 2020

[111] https://fra.europa.eu/en/publication/2021/fundamental-rights-report-2021 "Fundamental Rights Report 2021 - The coronavirus pandemic and fundamental rights: A year in review", 10 June 2021, pages 31-32

[112] https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680a60a50 "Covid-19 pandemic helped to reduce the prison population in Europe: Council of Europe's annual penal statistics released", Press Release from the Council of Europe, 5 April 2022

[113] Note, at the time of writing, the case *Faia v. Italy*, communicated on 5 May 2021, no. 17378/20, is pending before the Court. The case concerns whether the measures imposed to protect the applicant from Covid-19 (including social isolation) breached his Article 3 rights.

[114] *Ramirez Sanchez v. France*, Grand Chamber judgment of 4 July 2006, no. 59450/00, § 123

depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.[115]

Complete sensory isolation, coupled with total social isolation, can destroy an individual's personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.[116] Solitary confinement, even in cases entailing only relative isolation, should be based on genuine grounds, used only exceptionally after all other alternatives have been considered and with necessary procedural safeguards such as regular review.[117] The imposition of solitary confinement must also take into account the state of health of the person concerned,[118] including their mental health.[119]

It may be legitimate to move prisoners to a separate prison wing or to the prison hospital to provide them with a greater degree of comfort, better meals, longer exercise periods, access to their own kitchen and washroom, regular supervision of their medical treatment, and protection against infectious diseases. However, isolation should not be imposed as a pre-emptive measure, on those who are not suspected of having contracted the virus.[120] Where States discern that there are cases in which the use of isolation in places of detention is medically necessary, to ensure compatibility with Article 3, States should:

[115] *Rohde v. Denmark*, judgment of 21 July 2005 no.69332/01, § 93; *Rzakhanov v. Azerbaijan*, judgment of 4 July 2013, no. 4242/07, § 64

[116] *Messina v. Italy (no. 2)*, judgment of 28 September 2000, no. 25498/94

[117] *A.T. v. Estonia (no. 2)*, judgment of 13 November 2018, no. 70465/14, § 73; *Csüllög v. Hungary*, judgment of 7 June 2011, no. 30042/08 § 31

[118] *Jeanty v. Belgium*, judgment of 31 March 2020, no. 82284/17, § 117

[119] See on these issues and related debates, especially the treatment of prisoners during the pandemic, the decision of the French Conseil d'État of 8 October 2020, no. N° 444741.

[120] *Feilazoo v. Malta*, judgment of 11 June 2021, no. 6865/19 (included as a summary in this publication),; see also *Martzaklis and Others v. Greece*, judgment of 9 July 2015, no. 20378/13, §§ 67-75, where the Court found a violation of Article 3 alone and in conjunction with Article 14 where HIV-positive prisoners were placed in isolation, but where their condition of HIV had not developed to AIDS and there was no risk of them transmitting HIV to other prisoners; and https://www.justiceinitiative.org/uploads/7696dcfd-12e1-4ace-8f28-2a37f4a3c26b/brief-access-to-health-care-in-prisons-07082020.pdf "The Right to Health Care in Prison during the COVID-19 Pandemic", briefing paper from the Open Society Justice Initiative, July 2020.

i) Limit the use of medical isolation to prisoners who are infected or suspected of being infected with Covid-19 to prevent them from spreading it to others.
ii) Only use medical isolation as a last resort after considering whether alternatives such as release are appropriate.
iii) Regularly review the continued necessity of isolation, taking account of the impact on the person's mental health and whether they continue to test positive for Covid-19.
iv) Compensate for any restrictions on contact with the outside world, including visits, by increasing access to alternative means of communication (such as telephone or Voice-over Internet-Protocol communication).
v) In cases of isolation or placement in quarantine of a detained person who is infected or is suspected of being infected by the virus, the person concerned should be provided with meaningful human contact every day.
vi) Provide increased access to psychological support.[121]

Application of these principles to the wider population

As noted above, and in the section on Article 5 (Right to liberty) below, those in lockdown or quarantine conditions in their own homes, may also be deemed to be 'deprived of their liberty' by the State. As such, the principles set out above in relation to those detained in prisons or who live in other institutions run by the State apply equally to those in isolation in their own homes.

Reports indicate that there has been a general deterioration in mental health during periods of lockdown[122] for which increased isolation and a reduction in access to mental health services are viewed as key triggers.[123] States should

[121] See the CPT Statement of Principles and *Khudobin v. Russia*, judgment of 26 October 2006, no. 59896/00 (included as a summary in this publication), where a strong feeling of insecurity and fears of illness combined with physical sufferings amounted to degrading treatment within the meaning of Article 3.

[122] See https://unric.org/en/concerns-are-raised-over-the-threat-of-covid-19-to-mental-health-in-europe/ "Concerns are raised over the threat of COVID-19 to mental health in Europe", United Nations, 5 May 2020; https://www.theguardian.com/society/2020/jun/30/uks-mental-health-has-deteriorated-during-lockdown-says-mind "UK's mental health has deteriorated during lockdown, says Mind" by N.Davis, The Guardian, 30 June 2020

[123] See https://www.health.org.uk/news-and-comment/blogs/emerging-evidence-on-covid-19s-impact-on-mental-health-and-health "Emerging evidence on COVID-19's impact on mental health and health inequalities" by L.Marshall, J.Bibby and I.Abbs, The Health Foundation, 18 June 2020

therefore ensure quarantine and lockdown measures are only taken as a last resort, for as short a time as possible. Whilst such measures are in place States should adapt and increase the availability of access to mental health services and forms of communication with others to counter the negative impact that isolation can have on a person's mental health, particularly in situations where the impact on mental health may be so severe as to reach levels which engage Article 3.

Treatment of illnesses and conditions other than Covid-19

As noted above in the section on Article 2 (Right to life) within this publication, in particular the subsection: "Access to treatment for illnesses other than Covid-19", the measures taken to protect life and health by States have impacted access to healthcare for the treatment of other illnesses and conditions. Article 3 may also be engaged in this context, where a missed diagnosis or failure to treat a condition leads a person to experience illness or suffering that constitutes inhuman or degrading treatment. States should take account of the non-derogable nature of their obligations under Article 3 when determining which health care services should continue to be provided during a pandemic. Care for or treatment of any illnesses or conditions which may lead to suffering within the scope of Article 3 should be defined as 'essential' services during a pandemic and continue to operate to the extent possible.

Domestic Abuse

Concerns about higher levels of abuse against women and children during the pandemic are detailed in the section on Article 2 (Right to life) within this publication. This section regarding obligations under Article 3 of the Convention should be read in conjunction with the sections on domestic abuse within the sections on Articles 2 (Right to life), 8 (Right to respect for private and family life) and 14 (Freedom from discrimination) within this publication.

Article 3 imposes positive obligations on States to ensure that individuals within their jurisdiction are protected against all forms of ill-treatment prohibited under the Article, including when such treatment occurs at the hands of private individuals. As with Article 2, the procedural, regulatory and operational duties which arise under Article 3 apply in the context of domestic violence. States are under an obligation to prevent domestic abuse from taking place, and to promptly and effectively investigate, prosecute and punish incidents of domestic violence.

The Court has also used the wording of the Istanbul Convention to emphasise the specific nature of domestic violence and the special diligence needed to deal with domestic violence cases, stating that it imposes a duty on states to investigate the forms of violence covered by the Istanbul Convention without undue delay and to take into consideration the rights of the victim during all stages of criminal proceedings.[124]

Children

The concerns regarding mistreatment of children during the pandemic raised in the section on Article 2 (Right to life) above, may also give rise to issues under Article 3, either in conjunction with Articles 2, 8 or 14 or under Article 3 alone (for example where Article 2 is not relevant because there is no threat to life involved).

In order to assess the severity of the treatment committed against an individual, and whether it falls within the scope of Article 3 'the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim' have to be considered.[125] As such, it is more likely that ill-treatment which is not sufficient to engage Article 3 in respect of an adult will engage Article 3 in relation to a child or other vulnerable individual.

The Istanbul Convention

Articles 3 § f and 2 § 2 of the Istanbul Convention extend the provisions within the Istanbul Convention to children, as both victims and witnesses of domestic violence. Under the Istanbul Convention, it is the duty of the State to raise awareness of the consequences of violence (Article 13) and to consider the 'special needs' of witnesses of violence (Article 56), which may include 'psychosocial counselling' (Article 26 § 2). Article 18 of the Istanbul Convention reaffirms a State's obligation to establish preventative mechanisms and ensure that adequate legislation is in place in order to make the protections effective.

In light of the requirements of the Istanbul Convention, the Court has also affirmed that the punishment of those responsible for violence against or in the presence of children should be sufficiently severe as to act as a deterrent.[126]

[124] *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14.

[125] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication); Costello-Roberts v. the United Kingdom, judgment of 25 March 1993, no. 13134/87.

[126] *D.M.D. v. Romania*, judgment of 3 October 2017, no. 23022/13.

The Lanzarote Convention

The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) is also relevant in this respect. The Lanzarote Convention requires criminalisation of all kinds of sexual offences against children and sets out that states in Europe and beyond shall adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators. This includes an obligation that proceedings be conducted without 'unjustified delay' to avoid unduly prolonging a child's distress.

Scope of Article 3 in respect of child abuse

The Court has found a breach of Article 3 in a range of circumstances where abuse or neglect of children has been found to be so severe as to amount to inhuman and degrading treatment, and where the authorities were notified of such treatment or the risk of such treatment, but failed to take reasonable action to prevent it. The list below provides examples of situations which have been found to constitute a breach of Article 3:

i) Failure to provide adequate protection in law against physical abuse, including chastisement.[127]
ii) Failure to prevent the prolonged abuse of a boy with physical and mental disabilities at the hands of a group of children, where the abuse caused psychological harm.[128]
iii) Failure to place neglected children on the Child Protection Register or a delay in placing neglected children into care.[129]

[127] *A. v. United Kingdom*, judgment of 23 September 1998, no. 25599/94 where the repeated beatings of a nine-year old boy with a cane by his stepfather were deemed to reach the 'minimum level of severity' necessary to trigger the application of Article 3.

[128] *Dordevic v. Croatia*, judgment of 24 July 2012, no. 41526/10 where the Court found violations of Articles 3, 8 and 13 on account of the authorities' failure to act, despite the fact that the mother brought the abuse to the attention of the authorities.

[129] *Z and Others v. United Kingdom*, judgment of 10 May 2001, no 29392/95 where children were subjected to emotional abuse and severe physical neglect by their parents that resulted in physical and psychological injuries. The children's treatment amounted to inhuman and degrading treatment under Article 3 and, since the local authorities had been made aware of the situation but the children were only taken into emergency care four and half years later, the State had failed in its positive obligations under Article 3.

iv) Failure to prevent children from witnessing domestic violence committed against relatives.[130]
v) A delay in the investigation into physical and emotional abuse, and a failure to provide compensation to the victim for the delay or the abuse.[131]

All of the examples listed above are situations which may have become more common in the context of the pandemic, due to the increased exposure to harm amongst children who are forced to remain at home, and a reduction in capacity to address, prevent, prosecute and punish such harm. Where States are notified about threats of inhuman and degrading treatment against children, they must take measures to intervene to prevent a breach of Article 3. Whilst resources may be have been stretched and services reduced because of the pandemic, this cannot be used as an excuse to ignore these problems and to delay handling them, where such inaction risks a breach of Article 3.

Asylum Seekers and Migrants

The risk that some of the measures adopted by States in the name of protecting health may breach Article 3 has been particularly acute in the context of measures taken in relation to people in transit, for example migrants and asylum seekers. Attempts to seek asylum have been hindered by the closure of the necessary processing centres and certain States have implemented mass containment measures to prevent the movement into and within their territory[132]. Covid-19 also raises new issues under Article 3 in the context of extradition and expulsion[133].

[130] *E.S. and others v. Slovakia*, judgment of 15 September 2009, no. 8227/04

[131] See *D.M.D. v. Romania*, judgment of 3 October 2017, no. 23022/13 where the investigation into abuse by the applicant's father lasted three years and six months, the domestic courts offered no compensation to the victim for the delay or the abuse he suffered, and the proceedings failed to protect the child's dignity by affording protection against mistreatment in violation of Article 3 of the Convention.

[132] See the decree of 7 April 2020 by the Italian Government declaring Italian ports unsafe and aiming at safeguarding the functionality of national health structures and containing the spread of the coronavirus.

[133] See Giulia Borgna, "*Covid-19: La custodia cautelare nella fase esecutiva dell'estradizione*", 02 July 2020, commenting the decision of the Italian Supreme Court of Cassation of 26 June 2020 dealing with the impact of the Covid-19 pandemic in the enforcement of the extradition orders. In https://www.extradando.com/people#giulia-borgna. See also Suzanne Lambert "COVID-19 and Immigration Detention", 30 April 2020. In https://ukhumanrightsblog.com/2020/04/30/covid-19-and-immigration-detention/

Migrant reception, identification, or registration centres

Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens.[134] For many decades, States have held people entering their territories in detention centres created for the purpose of exercising such control. Measures introduced to restrict movement in response to the Covid-19 pandemic have also included the mass confinement of people in transit in temporary holding centres. As discussed in the section on Article 5 (Right to liberty) within this publication, mass confinement without permission to leave these centres can amount to a deprivation of liberty under Article 5[135]. Where this is the case, States' obligations to protect the health and safety of those deprived of their liberty extend to the people confined in such centres. The scope of these obligations are discussed in the section on Article 3 (Protection from inhuman and degrading treatment) of this publication (in particular in the section "*Obligations to protect the health and well-being of those for whom the State assumes responsibility*").

Further, even where asylum seekers are not held in conditions which constitute a deprivation of liberty, issues can arise under Article 3 if they are not provided with accommodation and adequate reception conditions.[136] Holding asylum seekers in dirty, overcrowded conditions, without access to water, soap, toiletries or other sanitary facilities can amount to inhuman and degrading treatment, in violation of Article 3.[137] Asylum-seekers are members of a particularly vulnerable and underprivileged population, in need of special protection and the Court will take account of the standards set out in the Reception Conditions Directive[138] when assessing the conditions in which they are held.[139]

[134] *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, nos. 9214/80, 9473/81 and 9474/81, Series A no. 94, § 67; *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15, § 125

[135] UN Network on Migration, "COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?", April 2020, available at: https://www.refworld.org/docid/5eac26514.html

[136] *N.T.P. and Others v. France*, judgment of 24 May 2018, no. 68862/13

[137] *N.T.P. and Others v. France*, judgment of 24 May 2018, no. 68862/13; *A.A. v. Greece*, judgment of 22 July 2010, no. 12186/08, §§ 57-65

[138] See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN "The Reception Conditions Directive", Directive 2013/33/EU of the European Parliament and Council, 26 June 2013

[139] *M.S.S. v. Belgium and Greece*, Grand Chamber judgment of 21 January 2011, no. 30696/09, § 251

Concerns have been raised about the conditions in which migrants and asylum seekers have been confined in the Western Balkans and Greek border regions during the pandemic, including reports of overcrowding, lack of access to health care, food, hygiene, water and sanitation facilities and the prevention of aid or support workers from entering the centres to offer support.[140]

The Court addressed this issue during the Covid-19 pandemic when it granted an interim measure requesting the Greek authorities to transfer an individual to, or at least to guarantee for him, accommodation with reception conditions which were compatible with Article 3, taking into account his age, and the duty to provide adequate healthcare and assistance to him, compatible with the state of his health.[141] The Court acknowledged the difficulties faced by Greece in trying to protect its population from the spread of Covid-19. However, the interim decision established that States were still required to take all necessary measures to protect those in reception centres from contracting Covid-19, including appropriate and timely access to medical consultations, adequate medical care and support, the provision of basic items such as food, water and soap, and ensuring individuals are able to comply with personal hygiene requirements.

Asylum Applications

A refusal to allow asylum seekers the possibility of applying for asylum when they enter a territory can also constitute a breach of Article 3.[142] Issues may arise under Article 13 in conjunction with Article 3, where a person present in a territory is unable to lodge an asylum application[143] or where such an application is not seriously examined.[144] States are obliged under Article 4 of Protocol No. 4 to provide genuine and effective access to means of legal entry, in particular border procedures, to allow all persons who face persecution to submit an application for protection (in particular where the application is based on Article 3) under

[140] See https://committees.parliament.uk/writtenevidence/4655/html/ "the Special Report on COVID-19 and Border Violence Along the Balkan Route", Report of the Border Violence Monitoring Network, 8 April 2020

[141] See *M.A. v. Greece*, interim decision of 7 April 2020, no. 15782/20 https://c7db895f-7823-4bab-aca6-270af12c4d6b.usrfiles.com/ugd/c7db89_b689018d5b144e4fb261cff12f8e77ac.pdf. See also Amnesty International, "Global: Ignored by COVID-19 Responses, Refugees Face Starvation." Amnesty International, 13 May 2020, https://www.amnesty.org/en/latest/news/2020/05/refugees-and-migrants-being-forgotten-in-covid19-crisis-response/.

[142] *Sharifi and Others v. Italy and Greece*, judgment of 21 October 2014, no. 16643/09

[143] *A.E.A. v. Greece*, judgment of 15 March 2018, no. 39034/12

[144] *M.S.S. v. Belgium and Greece*, Grand Chamber judgment of 21 January 2011, no. 30696/09, §§ 265-322.

conditions which ensure that the application is processed in a manner consistent with international norms including the Convention.[145]

The closure of border crossing points, asylum application centres and the institutions or courts responsible for processing asylum files has hindered the capacity of asylum-seekers to apply for asylum and affected the extent to which asylum claims are properly examined during the pandemic.[146] There have also been reports that States have used the exceptional circumstances to "justify" push-backs and mass transfers of groups of migrants and asylum seekers across borders in the name of protecting the health of those in State territory from the risk of the spread of disease by those in transit.[147] Whilst new measures may need to be introduced to process asylum applications in a safe manner, the pandemic should not be used to justify a refusal to deprive those who may seek asylum from this opportunity. Illegal pushbacks should not be used in any circumstances.[148]

Removal and Extradition Proceedings

As well as the issues in relation to immigration detention, Article 3 is also relevant to decisions to remove or extradite a person to a country where there is a risk that they would be subjected to conditions in breach of Article 3.

[145] *N.D. and N.T. v. Spain*, Grand Chamber judgment of 13 February 2020, nos. 8675/15 and 8697/15

[146] See the decision of the French authorities to completely stop processing asylum files, due to the closure of dedicated services and the lack of staff. On 30 May, the Council of State ordered the Interior Ministry to resume the registration of asylum requests, stressing the health emergency should not deprive asylum seekers of this fundamental right: https://www.liberation.fr/direct/element/le-conseil-detat-ordonne-la-reprise-de-lenregistrement-des-demandes-dasile-en-ile-de-france_113019/ "Le Conseil d'Etat ordonne la reprise de l'enregistrement des demandes d'asile en Ile-de-France", Liberation news, 1 May 2020

[147] See https://www.borderviolence.eu/news-from-trieste-covid-19-and-pushbacks/ "News from Trieste: Covid-19 and pushbacks", Report of the Border Violence Monitoring Network, 5 June 2020

[148] See https://www.coe.int/en/web/commissioner/-/pushbacks-and-border-violence-against-refugees-must-end "Pushbacks and border violence against refugees must end", Statement of the Council of Europe, 19 June 2020. See also: ejiltalk.org/non-refoulement-during-a-health-emergency, "Non-refoulement During a Health Emergency", Salvo Nicolosi, 14 May 2020 and ejiltalk.org/persons-at-sea-international-law-and-covid-19, "Persons at Sea, International Law and Covid-19", Sofia Galani, 24 November 2020.

Extradition

Article 3 imposes an obligation on States not to extradite a person to a country where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.[149] For example, where there are substantial grounds for believing the person would be subjected to the death penalty,[150] a whole life sentence without the possibility of release, or conditions of detention in breach of the requirements set out in the subsection "*Obligations to protect the health and well-being of those for whom the State assumes responsibility*" above, including conditions of detention that are inadequate for the specific vulnerabilities of the individual concerned.[151]

The Court will decide on the impact of the Covid-19 pandemic on the question of whether there would be a real risk of a breach of Article 3 on account of the conditions of detention that would be faced by an individual if extradited to the United States, in an extradition case before the Court concerning a sixty year old man with "a number of health conditions", including diabetes and asthma.[152] The Court's decision in this case will have implications regarding the impact of Covid-19 on detention conditions in prison systems beyond the context of extradition, as the assessment of whether the minimum level of severity has been met for the purposes of Article 3 is the same regardless of whether the context is domestic or extra-territorial.[153]

[149] *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88, §§ 88-91

[150] *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88; *Rrapo v. Albania*, judgment of 25 September 2012, no. 58555/10

[151] See *Aswat v. the United Kingdom*, judgment of 16 April 2013, no. 17299/12, concerning the extradition of a mentally ill individual.

[152] See *Hafeez v. the United Kingdom*, communicated on 24 March 2020, no. 14198/20. In the communication of the case, in addition to the question concerning the whole life sentence without the possibility of release, the Court added a specific question on Covid-19 risks in the following terms: "*2. Having particular regard to the ongoing Covid-19 pandemic, if the applicant were to be extradited would there be a real risk of a breach of Article 3 of the Convention on account of the conditions of detention he would face on arrival?*"

[153] *Babar Ahmad and Others v. the United Kingdom*, judgment of 10 April 2012, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, §172

Removal

In very exceptional cases Article 3 also prevents States from removing a seriously ill person from their territory where there are substantial grounds for believing that they would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or a significant reduction in life expectancy.[154] States must consider: (a) whether the care generally available in the receiving State "is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3"; and (b) the extent to which the individual would actually have access to such care in the receiving State (the associated costs, the existence of a social and family network, and the distance to be travelled to access the required care, all being relevant in this respect).

It is unclear whether this obligation might apply to prevent States from removing a person who is suffering from Covid-19 to a different country. However, it is possible that this situation could arise, if the impact of Covid-19 on the individual concerned was deemed to be capable of having a particularly severe impact on the person's health and if they were potentially being removed to a country without access to sufficient health equipment to treat them, for example, a country in which there was a shortage of ventilators.

In the exceptional situation of a global pandemic, it is uncertain how the fundamental notion of "risk" will be interpreted by the Court in all removal cases, being extradition, or asylum cases. The situation is more complex, uncertain and evolving compared with the situations previously addressed in the Court's case law on this topic.[155] In view of the difficulties faced across Europe in terms of economic and medical standards, whereby many countries have suffered shortages in medical equipment and experienced difficulties regarding their capacity to treat Covid-19, it might be difficult to say that removal to another country puts a person more at risk of being infected or being unable to access proper treatment.

[154] *Paposhvili v. Belgium*, Grand Chamber judgment of 13 December 2016, no. 41738/10, §183 (included as a summary in this publication)

[155] See *N. v. the United Kingdom*, Grand Chamber judgment of 27 May 2008, no. 26565/05; *D. v. the United Kingdom*, judgment of 2 May 1997, no. 30240/96; or more recently *Paposhvili v. Belgium*, Grand Chamber judgment of 13 December 2016, no. 41738/10 (included as a summary in this publication)

b. Procedural investigative duties

As with Article 2, Article 3 contains a distinct procedural obligation to carry out an effective investigation into alleged breaches of the Article. States are under an obligation to prevent and provide redress for torture and other forms of ill-treatment and Article 3 requires that there be an effective, official investigation into arguable claims of torture or ill-treatment. See the section on Article 2 (Right to life) (in particular subsection (b) "Procedural investigative duties") and the section on Article 6 (Right to a fair hearing) within this publication, for a full discussion on ways in which the Covid-19 pandemic poses obstacles to the fulfilment of this procedural obligation and the ways in which such issues may be overcome in a Convention compliant manner.

3. Article 8 – Right to respect for private and family life

The right to respect for private and family life under Article 8 is broad in scope. It imposes on States a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity.[156] This includes obligations to protect health where the injury or illness in question does not reach the level of severity necessary to trigger the obligations to protect life or health under Articles 2 or 3, but still qualifies as being protected under Article 8.

Numerous aspects of the governmental responses to Covid-19 to protect health also affect other aspects of the rights protected under Article 8. For example, the restrictions on spending time with family members, restrictions on the ways in which funerals are permitted to be carried out and restrictions on movement accompanied by the use of surveillance. Article 8 provides:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Section (a) below describes some of the numerous ways in which Article 8 is engaged by governmental responses to the pandemic, highlighting situations in which positive obligations may arise, or in which there is an interference with Article 8. However, interferences with Article 8 do not necessarily constitute a breach of the Article. Article 8 § 2 sets out certain situations in which an interference may be justified. Section (b) below therefore goes on to discuss the conditions under which the interferences with Article 8 discussed in section (a) may be permitted under Article 8 § 2.

[156] *Nitecki v. Poland*, admissibility decision of 21 March 2002, no. 65653/01 (included as a summary in this publication)

a. Scope of Article 8

Health care and treatment

Article 8 includes an obligation on States to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and to provide victims of medical negligence access to proceedings in which they could, in appropriate cases, obtain compensation for damage.[157] The principles which apply under Articles 2 and 3 in this context[158] also apply under Article 8 in the event of injury which falls short of threatening the right to life as secured under Article 2 or which does not reach the level of severity to constitute inhuman and degrading treatment under Article 3.[159]

Covid-19 has had a range of different effects on different people's health. In some cases, it has caused intense suffering and posed a threat to life (thereby engaging the obligations to protect life and health under Articles 2 and 3), in others the symptoms have been milder. In such cases, the symptoms may still affect a person's physical integrity, for example if they experience a high temperature, a continuous cough or a loss of sense of taste or smell, thereby engaging Article 8. There may therefore be an obligation under Article 8 for States to compel both public and private hospitals to adopt appropriate measures for the protection of their patients from Covid-19 in all case where Covid-19 affects a person's physical integrity.

There are two key aspects of the obligation on States to offer treatment against Covid-19 to individuals within their jurisdiction:[160]

[157] *Vasileva v. Bulgaria*, decision of 17 March 2016, 23796/10, § 63; *Jurica v. Croatia*, judgment of 2 May 2017, no. 30376/13 § 84; *Mehmet Ulusoy and Others v. Turkey*, judgment of 3 May 2007, no. 34797/03, § 82

[158] For a full discussion of these principles see the sections on Article 2 (Right to life) and 3 (Protection from inhuman and degrading treatment) within this publication.

[159] *İbrahim Keskin v. Turkey*, judgment of 27 March 2018, no. 10491/12, § 61

[160] See also General comment No. 14 "*The right to the highest attainable standard of health*" of the UN Committee on Economic, Social and Cultural Rights, 11 August 2000 (E/C.12/2000/4), where it is noted:

> *"[Article 12.2 (c). The right to prevention, treatment and control of diseases]*
>
> *16. ... The control of diseases refers to ... the implementation or enhancement of immunization programmes and other strategies of infectious disease control.*

i) Prevention measures, consisting in particular of a vaccination policy and the introduction of mass testing of the population in attempt to limit the spread of the virus; and
ii) Medical treatment of people infected with Covid-19.

Preventing infection with Covid-19

Three of the main strategies adopted by governments to seek to protect their populations from infection with Covid-19 include: the imposition of lockdowns and social distancing measures (discussed in more detail in the sections Article 5 (Right to liberty) and Article 2 of Protocol No. 4 (Right to freedom of movement) within this publication); the implementation of vaccination programmes; and the introduction of mass testing of the population. The latter two measures directly impact the rights guaranteed by Article 8 ECHR, as discussed below.

Vaccination

Over the course of the pandemic, efforts to contain its spread and its impact became increasingly focused on developing, producing and delivering a vaccine against Covid-19. Legislative, administrative and organisational measures were adopted by State authorities as well as public and private international bodies across the globe to seek to achieve the successful implementation of a vaccination programme.[161]

...

States must ensure provision of health care, including immunization programmes against the major infectious diseases ....

44. The Committee also confirms that the following are obligations of comparable priority:

...

(b) To provide immunization against the major infectious diseases occurring in the community;

(c) To take measures to prevent, treat and control epidemic and endemic diseases."

[161] For example, at the EU level, on 17 June 2020, the European Commission introduced a European strategy to accelerate the development, manufacturing and deployment of vaccines against Covid-19 across Europe, in recognition of the urgent need to develop a vaccine to combat the pandemic (see: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1597339415327&uri=CELEX:52020DC0245, Communication from the Commission, EU Strategy for Covid-19 vaccines, Brussels, 17.6.2020, COM(2020) 245 final). On 24 March 2021 a Programme for the European Union's action in the field of health ('EU4Health Programme') was introduced for the period 2021-2027 (see: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0522, Regulation (EU) 2021/522 of the European Parliament and of the Council of 24 March 2021). The programme encourages the adoption of coordinated public health measures at Union level, including the provision of

The implementation of vaccination programmes can be analysed from at least two perspectives under the Convention. First, as discussed in the section on Article 2 (Right to life) within this publication, States might be considered to have an obligation under the Convention, to provide access to vaccination against the virus as an effective means to provide immunisation, to protect the health of their populations and potentially also their right to life. On the other hand, the adoption of a vaccination policy, in particular a compulsory vaccination policy, raises numerous political, social and legal questions[162] and risks interfering with the rights guaranteed by Article 8. Additionally, where access to certain spaces is made dependent on vaccination status, mandatory vaccination could also interfere with a person's right to education, employment, freedom of movement, religion and assembly.

Voluntary vaccination schemes, which are designed to protect the health of society, and which are subject to a proper system of control to minimise the risks involved, do not constitute an interference with the right to respect for private life under Article 8.[163] Where a voluntary vaccination scheme is in place, there is no obligation under Article 8 for a State to provide specific, technical information on contra-indications or the risks associated with particular vaccines. It is legitimate for the State to take the view that there exists a general common knowledge that vaccination schemes involve certain risks, but that technical assessments of contra indications are matters best left to clinical judgment rather than, for example, the parents of a child being vaccinated.[164]

It is less clear, however, whether or not compulsory vaccination against Covid-19 would constitute an interference with Article 8 and, if it did, whether

information to address vaccine hesitancy and the promotion of research in relation to and development of vaccines, laying down Community procedures for the authorisation and supervision of medicinal products for and establishing a European Medicines Agency. See also on organisational measures at EU level the activity of the European Centre for Disease Prevention and Control, at https://www.ecdc.europa.eu/en/covid-19.

[162] For example, in the case of *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13 (included as a summary in this publication) in view of the difficulty and complexity of the issue, the Chamber to which these cases had been allocated relinquished jurisdiction in favour of the Grand Chamber. See also: https://www.ejiltalk.org/some-vaccination-questions-ethical-and-legal/, "Some Vaccination Questions, Ethical and Legal", Marko Milanovic, 3 February 2021 for discussion of a range of questions raised, including which States (if any) are obliged to vaccinate the populations of contested regions and if and how States should prioritise which groups are vaccinated first.

[163] *Association X. v United Kingdom*, Decision of the European Commission of 12 July 1978, no.7154/75

[164] *Association X. v United Kingdom*, Decision of the European Commission of 12 July 1978, no.7154/75

the duty to provide immunity from the virus would outweigh the right to choose whether or not to be vaccinated.

Compulsory Vaccination

Over the course of the pandemic, States have adopted varying approaches to encourage vaccination uptake. Some examples include:

- Austria introduced mandatory vaccination for all people over the age of 18, with penalties of up to €3,600 for those who declined a jab (unless they were pregnant or severely ill). However, the law was suspended a month after it took effect and repealed four months after it was introduced.
- Numerous States, including France, Greece, Hungary, Italy and Latvia introduced mandatory vaccination for certain professions such as health workers and workers in care facilities.
- Other States introduced a 'vaccine pass' or vaccine certification tool, which made travel and entry to certain spaces such as restaurants, entertainment venues and shops conditional on providing evidence of vaccination.

Compulsory vaccination, as an involuntary medical intervention, does constitute an interference with the right to respect for private life under Article 8.[165] The Court recognises that compulsory vaccination impacts an individual's enjoyment of their most intimate rights[166] and raises sensitive moral and ethical issues.[167]

[165] *Solomakhin v. Ukraine*, judgment 15 March 2012, no. 24429/03, § 33 (included as a summary in this publication) and *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, § 263 (included as a summary in this publication). The latter case concerned compulsory vaccination against poliomyelitis, hepatitis B, and other diseases (not including Covid-19), and the refusal of parents to allow their children to be vaccinated. However, the Grand Chamber hearing in this case took place on 1 July 2020, in the midst of debates concerning vaccination against Covid-19. The number of third-party interventions at the hearing, some directly referring to the Covid-19 pandemic, shows the relevance of the case to the situation in Europe during the pandemic (for example the third-party intervention by the Government of France, summarised at §§ 120-125 of the judgment).

[166] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, § 276 (included as a summary in this publication) and the references therein to *Solomakhin v. Ukraine*, judgment 15 March 2012, no. 24429/03 (included as a summary in this publication)

[167] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §279 (included as a summary in this publication)

However, where a compulsory vaccination scheme is introduced to protect against diseases which pose a serious risk to health, it can be deemed to serve the 'legitimate aims' under Article 8 of the protection of health and the protection of the rights of others, if it serves to increase vaccination uptake. The Court recognises that vaccines can be vital to protecting the health both of a person who is vaccinated, as well as protecting the health of those who cannot be vaccinated and are thus in a state of vulnerability and rely on the attainment of a high level of vaccination within society at large for protection against the contagious disease in question.[168]

Access to vaccination

As discussed in the section Article 2 (Right to life) of this publication,[169] the implementation of a vaccination programme corresponds to the aims of the protection of health and the protection of the rights of others and may be one mechanism by which States can fulfil their positive obligations under Articles 2, 3 and 8, to protect the lives and health of their citizens. The Court[170] and numerous States[171] have referred to the fact that an effective vaccination policy is part of the positive duty on the authorities to protect health.

However, as a result of the sudden and rapid development of the Covid-19 pandemic, health institutions at national and international level were not able to immediately create, produce and distribute substantial quantities of vaccines to effectively limit or stop the spread of the virus. Whilst there was a vital need for the quick production of a vaccine against Covid-19, any vaccine also needed to be

[168] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §272 (included as a summary in this publication)

[169] See the analysis of the positive obligations to protect life in the section of this Guide: Article 2 – Right to life, with particular reference to *Lopes de Sousa Fernandes v. Portugal*, Grand Chamber judgment of 19 December 2017, no. 56080/13, § 166

[170] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §282 (included as a summary in this publication).See also the partly concurring and partly dissenting opinion of Judge Lemmens, at §2, where he states unequivocally: "As the judgment makes clear, the vaccination duty is one way by which the authorities choose to fulfil their positive obligation to protect the right to health."

[171] *Vavřička and others v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13 (included as a summary in this publication). See the positions of the Government of the Czech Republic at §197, the French Government at §212, the German Government, at §220 and the Government of Slovakia at § 229.

safe and effective.[172] In these conditions it was not possible for the authorities to offer a vaccine against the virus to every individual. In particular at the start of the pandemic, States needed to prioritise which groups would receive the Covid-19 vaccine, when it was particularly limited in supply.[173] Many States designed vaccination policies which initially prioritised vaccination of certain age or vulnerability categories with a view to rolling out the vaccine to all individuals at a later date.

To properly fulfil the obligations under Articles 2, 3, 8 and 14, any vaccination policy should be accessible and effective. This means that the development and distribution of vaccines should comply with the relevant laws and procedures in place governing vaccination authorisation. Further, the criteria used to determine who receives a vaccine, and when, should be objective, based on scientific recommendations, and should comply with the principles of transparency and non-discrimination. For example, the European Law Institute principles on the equitable distribution of vaccines recommend that the order of priority, during the gradual build-up of vaccination capacities, should be assessed generally according to four criteria:[174]

i) vulnerability with regard to the acute effects of COVID-19 and its variants;
ii) higher risk because of lack of access to healthcare;
iii) a necessarily higher risk of spreading and multiplying factor and/or systematic contact with ill and vulnerable persons, to the extent that vaccination prevents vaccinated persons from spreading the virus; and
iv) systematic contact with ill and vulnerable persons, as well as key individuals for the functioning of the Public State.

[172] For example, a case was brought before the EU General Court by 775 applicants against the European Commission (case number: T-695/21) for its failure to include carcinogenicity and genotoxicity testing in the preclinical phase for the mRNA-technology vaccines, such as to fight Covid-19, prior to authorisation.

[173] See: https://gh.bmj.com/content/6/2/e004462: "An intersectional human rights approach to prioritising access to COVID-19 vaccines", Sekalala S, Perehudoff K, Parker M, et al. BMJ Global Health, 24 February 2021

[174] https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/2021_Supplement_to_the_ELI_Principles_for_the_COVID-19_Crisis.pdf "ELI Principles for the Covid-19 Crisis", 2021 Supplement. See also https://rm.coe.int/dh-bio-statement-vaccines-e/1680a12785 "COVID-19 and vaccines: Ensuring equitable access to vaccination during the current and future pandemics", Council of Europe Committee on Bioethics (DH-BIO), 22 January 2021

Vaccination policies must also include measures to tackle the issue of dissemination of fake vaccines to avoid practices which could put at risk human health.[175]

Testing for Covid-19

Taking blood samples or taking swabs are medical interventions which, even if of minor importance, constitute interferences with the right to respect for private life.[176] Swabs are one method of testing for Covid-19. Whilst they constitute an interference with Article 8 rights, the Court has also asserted that the taking of a swab is an act of short duration, it usually causes no bodily injury or any physical or mental suffering and will generally be justified where it is carried out in accordance with law for a legitimate aim.[177]

Mask Wearing

The obligation to wear a mask whilst in public and private spaces such as shops, pharmacies, or while travelling can also raise issues under Article 8. Personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and therefore fall within the notion of private life. The notion of private life also protects a right to identity and to establish and develop relationships with other human beings and the outside world. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" and which may be impacted by the obligation to wear a mask.[178]

Interferences with this aspect of the right to private life have generally been found to be justified where a State can clearly identify how the interference serves a properly identified legitimate aim. In the context of wearing a mask, this is likely to mean where scientific data and recommendations justify laws on mask

[175] See "*Advice on the application of the MEDICRIME Convention in the context of Covid-19*", given by the Committee of the Parties of the MEDICRIME Convention, Strasbourg, 8 April 2020, to fight the phenomenon of counterfeit or falsified Covid-19 vaccines.

[176] *Schmidt v. Germany*, admissibility decision of 5 January 2006, no. 32352/02; *Caruana v. Malta*. admissibility decision of 15 May 2018, no. 41079/16

[177] *Caruana v. Malta*. admissibility decision of 15 May 2018, no. 41079/16

[178] See *S.A.S. v. France*, Grand Chamber judgment of 1 July 2014, no.43835/11, §§ 106-107, *Gough v. the United Kingdom*, judgment of 28 October 2014, no. 49327/11, §§ 182-184

wearing, taking account of the risk of infection in a certain space and the potential for mask wearing to combat that risk.[179]

Medical treatment of people infected with Covid-19

Article 8 is also engaged in the context of treating Covid-19. States are under a positive obligation to take all legislative, operational and institutional measures reasonably open to be taken by them, to provide the necessary treatment to people infected with the virus.[180] In this context, strategies for appropriate treatment have been discussed and agreed at a European level.[181] This obligation includes a duty to avoid providing treatment which might be dangerous to human health, or clearly ineffective.[182]

In addition, the issues concerning prioritisation and equal access to medical treatment (discussed above in the context of vaccination polices) also apply to the obligation to provide medical treatment during the Covid-19 pandemic, under Articles 2, 3 and 8, taken alone or in conjunction with Article 14. The number and the severity of cases of infection with Covid-19 meant that the authorities were forced to make difficult choices in adopting priority policies for the medical

[179] Contrast *Gough v. the United Kingdom*, judgment of 28 October 2014, no. 49327/11, §155 with *Biržietis v. Lithuania*, judgment of 14 June 2016, no. 49304/09, §§ 53-58, in the latter case, there was a breach of Article 8, where the Governmnet had not been able to clearly identify or provide examples of how growing a beard could lead to disorder or crime. See also the order of the Strasbourg Administrative Tribunal on 20 May 2020 to suspend a decree of the City of Strasbourg obliging all persons older than 11 years' old to wear mask when walking in the city: http://strasbourg.tribunal-administratif.fr/content/download/171091/1705849/version/1/file/2003058-1.pdf Ordonnance n°2003058 du 25 Mai 2020, Tribunal Administratif de Strasbourg. The Tribunal referred to Article 8 of the ECHR and to the principles of legitimate aim and proportionality, finding the measure was not justified by a compelling reason linked to local circumstances in Strasbourg. Based on the same principles on 2 September 2020, the Tribunal annulled the decree and invited the local authorities to amend it.

[180] *Vavřička and Others v. the Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §282, İbrahim Keskin v. Turkey, judgment of 27 March 2018, no. 10491/12,§§ 61-70; *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 13237/17, §§ 82-90, etc.

[181] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Strategy on Covid-19 Therapeutics (COM/2021/355 final/2), 6 May 2021

[182] For example, treating Covid-19 with remdesivir. See: https://www.who.int/news-room/feature-stories/detail/who-recommends-against-the-use-of-remdesivir-in-covid-19-patients, Note published on 20 November 2020 by the World Health Organisation advising against the use of remdesivir for the treatment of Covid-19 .

treatment of people infected with Covid-19, in light of the extreme pressure placed on their health systems.[183]Any decision to prioritise treating certain groups or individuals ahead of others needs to be made on the basis of clear criteria, and objectively justified health policies. In addition, as discussed in the section on Article 2 (Right to life) within this publication, discussing procedural obligations in relation to medical negligence, States are also obliged under Article 8 to establish mechanisms capable of appropriately identifying and correcting systemic deficiencies in providing medical treatment against Covid-19.[184]

Access to information concerning health

The right to effective access to information concerning health also falls within the scope of private and family life.[185] A State may be required to provide essential information about risks to one's health in a timely manner,[186] for example where a State engages in hazardous activities, which might have hidden adverse consequences on the health of those involved in such activities. In such situations, the State must establish an effective and accessible procedure to enable such persons to seek all relevant and appropriate information.[187] This obligation may apply in the context of the pandemic, where people were required to go to work in environments in which they risk contracting Covid-19.

Mental Health

Mental health is a crucial aspect of moral integrity and falls within the scope of Article 8. The preservation of mental stability is seen by the Court to be an indispensable precondition to the effective enjoyment of the right to respect for

[183] See: https://oecd.org/coronavirus/policy-responses/beyond-containment-health-systems-responses-to-covid-19-in-the-oecd-6ab740c0/ "*Beyond containment: Health systems responses to COVID-19 in the OECD*", 16 April 2020. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU Strategy on Covid-19 Therapeutics (COM/2021/355 final/2), 6 May 2021

[184] *İbrahim Keskin v. Turkey*, judgment of 27 March 2018, no. 10491/12, §§ 61-68

[185] *K.H. and Others v. Slovakia*, judgment of 28 April 2009, no. 32881/04, § 44

[186] *Guerra and Others v. Italy*, Grand Chamber judgment of 19 February 1998, no. 14967/89 §§ 58 and 60 (included as a summary in this publication)

[187] *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998, nos. 23414/94, 21825/93; §§ 97 and 101; *Roche v. the United Kingdom*, Grand Chamber judgment of 19 October 2005, no.32555/96, § 167

private life.[188] As discussed in the sections on Article 2 (Right to life) and Article 3 (Protection from inhuman and degrading treatment) within this publication, there was a general deterioration in mental health during the pandemic.[189]

States' regulatory and operational obligations under Articles 2 and 3 may be triggered to protect a person from the impact of lockdown measures where the impact is so severe as to constitute inhuman and degrading treatment or to pose a threat to their life from self-harm. Positive obligations to take measures to protect the mental health of the population impacted by the measures taken to respond to the pandemic may also arise under Article 8. This could include obligations to adapt and increase access to mental health support, as discussed in the sections on Article 2 (Right to life) and Article 3 (Protection from inhuman and degrading treatment) within this publication. It might also include protecting the right to family life where the lack of access to physical contact or in-person emotional support would seriously disturb a person's emotional and psychological balance.[190] States must balance the need to protect life and health from Covid-19 against the impact that isolation can have on a person's mental health, when formulating policies on social distancing and regulations on family visits.

Domestic Abuse

As noted in the sections on Articles 2 (Right to life), 3 (Protection from inhuman and degrading treatment), and 14 (Freedom from discrimination) within this publication, there are indications that domestic abuse against women and children increased, and that there was an increase in children's and young people's vulnerabilities during the pandemic.[191] As discussed in the sections on Articles 2

[188] *Bensaid v. the United Kingdom*, judgment of 6 February 2001, no. 44599/98, § 47

[189] See the sections on Article 2 (Right to life) and Article 3 (Protection from inhuman and degrading treatment) within this publication.

[190] See *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96, §§ 64-65; *Buscemi v. Italy*, judgment of 16 September 1999, no. 29569/95, § 55, where a 13 year-old girl had expressed her clear wish not to see her father, and had done so for several years, and where forcing her to see him would seriously disturb her emotional and psychological balance, the decision to refuse contact with the father was taken to be in the best interests of the child. It may be that conversely, where a lack of contact / ability to visit family members could have a disturbing effect on a person's psychological balance Article 8 is also engaged.

[191] See section above and https://learning.nspcc.org.uk/media/2246/isolated-and-struggling-social-isolation-risk-child-maltreatment-lockdown-and-beyond.pdf "Isolated and struggling: social isolation and the risk of child maltreatment, in lockdown and beyond", E.Romanou and E.Belton, NSPCC Evidence team, June 2020

(Right to life) and 3 (Protection from inhuman and degrading treatment) within this publication, in certain situations, States are obliged to take measures to prohibit, prevent, investigate, prosecute and punish acts of violence committed by private individuals. The obligations to prohibit, prevent, investigate, prosecute and punish that can arise under Articles 2 and 3[192] might also arise under Article 8 where acts between individuals are not sufficiently severe to engage Articles 2 or 3, but where they do infringe a person's moral, physical or personal integrity.[193]

Under Article 8 States have a duty to protect the physical and moral integrity of an individual from infringement by private persons. This positive duty arises particularly in relation to the safeguarding of vulnerable individuals, and includes protection of women and children against domestic abuse.[194] The forms of abuse or harm which might trigger the protection of Article 8 include acts violating personal integrity which do not involve physical violence or a threat to life.[195] States are under positive obligations to establish and apply effectively a system punishing all forms of domestic violence[196] and abuse against vulnerable individuals which might impact their physical, moral or personal integrity. This could include grooming, neglect, exploitation or emotional abuse, as well as physical violence.

Domestic violence can affect children's physical and mental welfare, not only as a consequence of being the victims of such practices, but also indirectly when they are forced to witness acts of domestic violence against their siblings or

[192] For a full discussion of the conditions required for such obligations to arise and the scope of the obligations, see the sections on Article 2 (Right to life) and Article 3 (Protection from inhuman and degrading treatment) within this publication.

[193] *Bevacqua and S. v. Bulgaria*, judgment of 12 June 2008, no 71127/01

[194] See *X and Y v. the Netherlands*, judgment of 26 March 1985, no. 8978/80 where the Court observed that States have a positive obligation to provide dedicated protection to children and other vulnerable individuals through measures of 'effective deterrence, against serious breaches of personal integrity'.

[195] See *Söderman v. Sweden*, judgment of 12 November 2013, no. 5786/08 where the Court found that the State failed to comply with its obligation under Article 8 to have an adequate legal framework in place to provide the applicant with protection against the concrete actions of her stepfather and to provide her with remedies against the consequent violation of her personal integrity when he had attempted to secretly film her naked in their bathroom when she was 14 years old. The act in the case did not involve any physical violence, but the Court concluded that neither a criminal remedy nor a civil remedy existed under Swedish law that could enable the applicant to obtain effective protection against the violation of her personal integrity.

[196] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication)

parents. Witnessing violence can constitute inhuman and degrading treatment in violation of Article 3.[197] However, the Court has also dealt with the impact of witnessing violence on a child's psychological well-being under Article 8 alone. It found a breach of Article 8 where the applicant children's psychological well-being had been adversely affected by being victims of verbal abuse, as well as repeatedly witnessing their father's violence against their mother, and where little or no action had been taken to prevent the recurrence of such behaviour.[198]

Privacy, the collection and storage of data

Storing information relating to an individual's private life amounts to an interference with Article 8. What constitutes information relating to an individual's private life will depend upon the specific context in which the information has been recorded and retained, the nature of the records, the way in which the records are used and processed and the results that may be obtained.[199] The Court has found that a requirement on a person to provide full information about their whereabouts and activities constitutes an interference with the right to private life.[200] Measures introduced to track the location of people who are subject to quarantine measures such as using their phone location or traffic data[201] are therefore also likely to constitute an interference with Article 8.

[197] See the section on Article 3 (Protection from inhuman and degrading treatment) within this publication.

[198] *Eremia and others v. The Republic of Moldova*, judgment of 28 May 2013, no. 3564/11

[199] *S. and Marper v. the United Kingdom*, Grand Chamber judgment of 4 December 2008, nos. 30562/04 and 30566/04, § 67 (included as a summary in this publication)

[200] See *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, judgment of 18 January 2018, nos. 48151/11 and 77769/13, §§ 155-159 where the State required high-level athletes to provide, at three-monthly intervals, full information on their whereabouts and daily activities, including at weekends, and to update that information, as part of the effort against doping in sport; see also *Uzun v. Germany*, judgment of 2 September 2010, no. 35623/05, §§ 51-53 where collection of data through a GPS device attached to a person's car and storage of data concerning that person's whereabouts and movements in the public sphere was found to constitute an interference with private life.

[201] See for example the announcement of the Serbian President that the State was tracking the mobile phones of people entering the country to monitor their movements: https://mondo.rs/Info/Drustvo/a1298105/Aleksandar-Vucic-policija-telefonski-brojevi-policijski-sat-upozorenje-krecu-se.html "Vučić: Ne ostavljajte telefone, necćete nas prevariti! ZNAMO da se krecćete", Izvor, Mondo news, 19 March, 2020

The protection of personal data is of fundamental importance to a person's enjoyment of their right to respect for private life.[202] The collection, storage, use, disclosure, publication and retention of personal data all fall within the scope of Article 8. Respecting the confidentiality of health data is a vital principle to ensure respect for the privacy of a patient, but also to help preserve confidence in the medical profession and in health services. Breaching this confidence could deter those in need of medical assistance from revealing the personal and intimate information it is necessary to share to receive appropriate treatment or could even deter them from seeking any assistance at all, which could endanger their own health and, in the case of transmissible diseases, the health of the community.[203] The collection of health data by an institution responsible for monitoring the quality of medical care[204] and disclosure of medical information without a person's consent to journalists, prosecutors,[205] other government departments or civil servants,[206] a person's employer[207] or their own family member[208] all constitute an interference with Article 8.[209]

Measures introduced by States to combat Covid-19, for example the introduction of contact tracing apps and the sharing of health data with other States to conduct scientific research, involve the mass collection of data and interfere with the right to privacy under Article 8. Further, as part of Covid-19 vaccination strategies, States also need to create systems to ensure that personal data collected in the framework of those strategies, including data about the delivery and regulation of vaccination certificates, are well protected from abuse.[210] The Court has previously found, in

[202] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Grand Chamber judgment of 27 June 2017, no. 931/13, § 133

[203] *L.H. v. Latvia*, judgment of 29 April 2014, no. 52019/07 (included as a summary in this publication)

[204] *L.H. v. Latvia*, judgment of 29 April 2014, no. 52019/07 (included as a summary in this publication)

[205] *Avilkina and Others v. Russia*, judgment of 6 June 2013, no. 1585/09, § 54

[206] *M.S. v. Sweden*, judgment of 27 August 1997, no. 20837/92, § 35

[207] *Radu v. Moldova*, judgment of 15 April 2014, no. 50073/07 (included as a summary in this publication)

[208] *Mockutė v. Lithuania*, judgment of 27 February 2018, no. 66490/09

[209] For example, with regard to data on Covid-19 patients, the Bulgarian Constitutional Court has ruled on the constitutionality of certain provisions of the Bulgarian law on electronic media of March 24, 2020, allowing access to traffic data. The Constitutional Court decided that the possibility for the Ministry of the Interior to have access to this data, collected in a general and non-selective manner, for a period of six months and not limited to the duration of the state emergency, to locate sick people, was illegal and disproportionate. The Constitutional Court only allowed access to the data of persons suffering from communicable diseases and opposing their isolation or compulsory treatment, only until their recovery or the end of their isolation, and only with the consent of the interested person (Конституционен съд, judgment no 15 of 17.11.2020, 15/2020 (BG)).

[210] https://rm.coe.int/t-pd-bur-2021-6rev2-statement/1680a25713 Council of Europe Statement on Covid-19

the context of a case on the confidentiality of information relating to HIV, that the right to privacy must benefit from heightened protection where the disclosure of information can have severe consequences for the private and family life of an individual and their social and professional situation, including exposure to stigma and possible exclusion.[211] Given the consequences which can flow from a diagnosis of Covid-19, including quarantine measures which impact on a person's social, family and working life as well as stigma, it is likely that States will need to impose strict protections of health data connected to Covid-19 to comply with Article 8.[212]

Whilst digital solutions have been deemed to be central to combatting the Covid-19 pandemic, given the privacy-intrusive nature of technology such as contact tracing apps, States also need to be able to demonstrate that such technology is capable of and helping to achieve the aim of protecting health.[213]

Surveillance

Surveillance of a person's movement, for example tracking their location using GPS data, also constitutes an interference with their right to respect for private life. The mere existence of secret surveillance measures or of legislation permitting such measures can constitute a violation of Article 8. An applicant can claim to be the

Vaccination, attestations and data protection, Strasbourg, 3 May 2021.

[211] *Z v. Finland*, judgment of 25 February 1997, no. 22009/93, § 96; *C.C v. Spain*, judgment of 6 October 2010, no. 1425/06, § 33; *Y v. Turkey*, admissibility decision of 17 February 2015, no. 648/10, § 68

[212] See the decision of the French Conseil d'État of 13 October 2020, no. 444937, *Association le Conseil National du Logiciel Libre et autres*. See also for a comparative analysis, the contributions at the e-conference on "*Data protection Issues and Covid-19: Comparative Perspectives*", in https://blogdroiteuropeen.com/2020/07/02/covid-19-and-data-protection-in-portugal-by-rui-t-lanceiro/.

[213] https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-coronavirus-pandemic-eu-bulletin-may_en.pdf "*Coronavirus Pandemic in the EU – Fundamental Rights Implications: With a Focus on Contact-Tracing Apps*", FRA Bulletin, 21 MARCH TO 30 April 2020, which states: politicians, data protection authorities, NGOs and experts across the EU have highlighted the need for safeguards, such as prohibiting further use of collected data for other purposes. Various actors have also questioned the efficacy of mobile apps. Some refer to this technological approach to COVID-19 as 'digital public health experimentation'. A study by the University of Oxford, for example, highlights that approximately 60 % of the population should be using a contact-tracing app for it to have any real impact. A month after the release of an app in Singapore, however, only a fifth of the population was using it. Others caution that contact-tracing apps provide a false sense of security, as mobile phones and their sensors are tracing coronavirus exposure. Most experts agree that apps should complement other measures, such as established epidemiological methods for contact-tracing, to contain the transmission of the virus.

"victim" of a violation of Article 8 without needing to prove that secret surveillance measures have been applied directly to them, in the following circumstances:

i) if they fall within the scope of the legislation permitting secret surveillance measures (either because they belong to a group of persons targeted by the legislation or because the legislation directly affects everyone); or
ii) if no remedies are available for challenging the operation of the secret surveillance.[214]

Visiting and spending time with family and friends

The restrictions on movement implemented as a response to Covid-19 interfered with the right to visit, and in some cases to live with other family members, preventing physical contact between those who do not live in the same household, including for example between parents and children where parents share custody of their child, or between children and parents where a parent is in prison.

Family life

An essential part of the right to respect for family life is the right for family members to live together and to visit each other so that family relationships can develop[215] and so that family members can enjoy each other's company.[216] The question of whether "family life" exists is a question of fact depending on the real existence of close, personal ties.[217] The concept of family life covers the relationship between parent and child, siblings, aunts/uncles and nieces/nephews and children and grandparents.[218]

[214] *Roman Zakharov v. Russia*, Grand Chamber judgment of 4 December 2015, no. 47143/06 (included as a summary in this publication)

[215] *Marckx v. Belgium*, judgment of 13 June 1979, no. 6833/74, § 31

[216] *Olsson v. Sweden (no. 1)*, judgment of 24 March 1988, no. 10465/83, § 59

[217] *Paradiso and Campanelli v. Italy*, Grand Chamber judgment of 24 January 2017, no. 25358/12, § 140

[218] Siblings: *Moustaquim v. Belgium*, judgment of 18 February 1991, no. 12313/86, § 36; *Mustafa and Armağan Akın v. Turkey*, judgment of 6 April 2010, no. 4694/03, § 19; aunts/uncles and nieces/nephews: *Boyle v. the United Kingdom*, judgment of 27 April 1988, nos. 9659/82 and 9658/82, §§ 41-47; and grandparents: *Kruškić v. Croatia*, admissibility decision of 25 November 2014, no. 10140/13, § 111; *Mitovi v. the Former Yugoslav Republic of Macedonia*, judgment of 16 April 2015, no. 53565/13, § 58

The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life within the meaning of Article 8, even if the relationship between the parents has broken down. Domestic measures hindering such enjoyment amount to an interference with Article 8.[219] The relationships between adults and their parents and siblings are protected under Article 8, even where they do not live together and where they have moved into their own home and formed a separate family household.[220] However, family ties between adults and their parents or siblings attract less protection than those of a child and their parents or siblings, unless there is evidence of further elements of dependency, involving more than the normal emotional ties.[221] The right to respect for family life of grandparents in relation to their grandchildren primarily entails the right to maintain a normal grandparent-grandchild relationship through contact between them, although protection of family ties in this context will also be less than that afforded to a parent-child relationship.[222]

Children of prisoners

As discussed in the section on Article 3 (Protection from inhuman and degrading treatment) within this publication, many States have introduced a temporary ban on prison visits, to prevent the spread of Covid-19. When a parent is detained in prison, both the parent and the child's right to family life are engaged. A State has positive obligations under Article 8 to enable and assist a detainee in maintaining contact with his or her close family and unnecessary or disproportionate restrictions on visiting rights may violate Article 8.[223]

[219] *Monory v. Romania and Hungary*, judgment of 5 April 2005, no. 71099/01, § 70; *Zorica Jovanović v. Serbia*, judgment of 26 March 2013, no. 21794/08, § 68; *Kutzner v. Germany*, judgment of 26 February 2002, no. 46544/99, § 58; *Elsholz v. Germany*, Grand Chamber judgment of 13 July 2000, no. 25735/94, § 43; *K. and T. v. Finland*, Grand Chamber judgment of 12 July 2001, no. 25702/94, § 151

[220] *Boughanemi v. France*, judgment of 24 April 1996, no. 22070/93, § 35; *Moustaquim v. Belgium*, judgment of 18 February 1991, no. 12313/86, §§ 35 and 45-46

[221] *Benhebba v. France*, judgment of 10 July 2003, no. 53441/99, § 36; *Mokrani v. France*, judgment of 15 July 2003, no. 52206/99, § 33; *Onur v. the United Kingdom*, judgment of 17 February 2009, no. 27319/07, § 45; *Slivenko v. Latvia*, Grand Chamber judgment of 9 October 2003, no. 48321/99, § 97; *A.H. Khan v. the United Kingdom*, judgment of 20 December 2011, no. 6222/10, § 32

[222] *Kruškić v. Croatia*, admissibility decision of 25 November 2014, no. 10140/13, § 111; *Mitovi v. the Former Yugoslav Republic of Macedonia*, judgment of 16 April 2015, no. 53565/13, § 58

[223] *Horych v. Poland*, judgment of 17 April 2012, no. 13621/08

Private Life

Other close relationships that are not included within the scope of "family life" may be protected under the right to respect for private life.[224] The right to respect for private life under Article 8 includes a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[225] It does not, however, cover every public activity that a person seeks to engage in with other human beings and not every kind of relationship falls within the sphere of private life. For example, Article 8 does not protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the action or inaction of a State and a person's private life.[226]

Funerals

The right to attend the funeral of a family member, the right to be informed about a family member's death before their funeral takes place, the way in which the body of a deceased family member is treated and whether the body is returned to the family of the deceased all fall within the ambit of Article 8.[227] The Covid-19 pandemic led States to regulate the way funerals were conducted and to limit the number of people who were permitted to attend.[228] Measures including shortening the length of funerals, burying the deceased in sealed metal coffins rather than wooden caskets, not allowing a funeral service to take place in a church or chapel, only permitting a limited number of 'close' relatives to attend, and not allowing the body of the deceased to be brought home are all likely to constitute an interference with Article 8.

[224] *Znamenskaya v. Russia*, judgment of 2 June 2005, no. 77785/01, § 27 and the references cited therein

[225] *Niemietz v. Germany*, judgment of 16 December 1992, no. 13710/88, § 29; *Pretty v. the United Kingdom*, judgment of 29 April 2002, no. 2346/02, §§ 61 and 67

[226] *Friend And Others v. The United Kingdom*, judgment of 24 November 2009, nos. 16072/06 and 27809/08 where the Court found that, despite the obvious sense of enjoyment and personal fulfilment the applicants derived from hunting and the interpersonal relations they had developed through it, hunting was too far removed from the personal autonomy of the applicants, and the interpersonal relations they relied on were too broad and indeterminate in scope, for hunting bans to amount to an interference with their rights under Article 8.

[227] *Sabanchiyeva and Others v. Russia*, judgment of 6 June 2013, no. 38450/05(included as a summary in this publication); *Solska and Rybicka v. Poland*, judgment of 20 September 2018, nos. 30491/17 and 31083/17, §§ 104-108 and the references cited therein.

[228] See https://balkaninsight.com/2020/04/20/pandemic-wreaks-havoc-with-ancient-balkan-funeral-traditions/ "Pandemic Wreaks Havoc with Ancient Balkan Funeral Tradition", Balkan Insight news, April 20, 2020

b. Limitations

As with Articles 9-11 of the Convention, interferences with Article 8 are permitted if they pursue a legitimate aim, are in accordance with law and proportionate to the legitimate aim pursued. Article 8 § 2 permits interferences with the right to respect for private and family life for the protection of health or public safety, this is deemed to be a legitimate aim. The requirements of lawfulness and proportionality are considered below.

Lawfulness

Any interference with the rights protected under Article 8 must be in accordance with domestic law, and the relevant domestic law must comply with the requirements of the rule of law, meaning it must be clear and accessible and its consequences must be foreseeable. Generally, the requirement of foreseeability means that individuals must be able to predict when their actions will put them in breach of a law, and what consequences this could have. These requirements apply in each of the contexts described above, however they are slightly modified in the specific context of surveillance. We have therefore described the requirements of lawfulness in the context of surveillance in more detail below.

The requirement of "foreseeability" does not always mean that individuals should be able to foresee when the authorities are likely to intercept their communications so that they can adapt their conduct accordingly.[229] This would be an impossible requirement given the nature of surveillance.

Instead, in the context of surveillance the law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such secret measures.[230] It must also indicate the duration of the measure, the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties, the circumstances in which data may or must be erased or destroyed and the arrangements for supervising the implementation of the measures.[231]

[229] *Weber and Saravia v. Germany*, judgment of 29 June 2006, no. 54934/00, § 93

[230] *Roman Zakharov v. Russia*, Grand Chamber judgment of 4 December 2015, no. 47143/06, §§ 231 (included as a summary in this publication)

[231] *Roman Zakharov v. Russia*, Grand Chamber judgment of 4 December 2015, no. 47143/06 §§ 231 and 238-301

Where States deem it necessary to introduce surveillance measures, or where they begin collecting health data to combat the spread of Covid-19, the domestic law introducing such measures must therefore indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the domestic authorities to collect and store information on people's health and movements and must clearly set out minimum safeguards against abuse.

Proportionality

To be considered proportionate any measures which interfere with the rights protected under Article 8 should be the least restrictive means of achieving the aim pursued. The measures should only be in place for as long as necessary to prevent the spread of Covid-19 and any decisions to tighten or reduce such measures should be informed by reference to scientific evidence and advice. In the context of restrictions on family visits, factors which could be relevant to a proportionality assessment include: the length of time for which the restrictions are in place, the level of dependence and/or closeness involved in the relationship in question and whether alternative ways of maintaining contact are possible whilst physical contact is not permitted. In the context of healthcare, the extent to which an obligation would require the allocation of State resources will be a key issue. In the context of compulsory administration of medical treatment or vaccinations, an ability to review the decision to administer such treatment, and the extent to which the treatment is responding to an emergency situation will be relevant.

Some more specific examples of the considerations which might arise in the proportionality assessment under Article 8 are discussed below.

Vaccination

As a starting point, healthcare policy matters normally come within the margin of appreciation of the national authorities.[232] When assessing the proportionality of vaccination schemes, States are generally afforded a wide margin of appreciation, in light of the general consensus across Europe, strongly supported by specialised international bodies, that vaccination is one of the most successful and cost-effective health interventions. The Court acknowledges that

(included as a summary in this publication)

[232] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13 (included as a summary in this publication), §280

it is generally accepted that States should aim to achieve the highest possible level of vaccination among their populations.[233] The margin of appreciation regarding how to deliver a vaccination programme will also be wide where there is no European or international consensus regarding the most effective model or policy on how to deliver vaccination. For example, in the context of vaccination of children, where there exists a spectrum of approaches to vaccination across Europe, ranging from one based wholly on recommendation, through to those that make one or more vaccinations compulsory or make it a matter of legal duty to ensure the complete vaccination of children.[234]

Further where a vaccination policy exists to protect populations against a disease that can have severe effects on individual health, and where serious outbreaks of the disease may cause severe disruption to society, the vaccination policy is likely to be deemed to serve a pressing social need (in particular where specialist experts in the jurisdiction have recommended the vaccination policy or determined that it is necessary). As discussed in the sections on Article 2 (Right to life) and Article 3 (Protection from inhuman and degrading treatment) of this publication, the Court accepts that the implementation of a vaccination policy can constitute a means of fulfilling the positive obligations on States under Articles 2, 3 and 8 to take appropriate measures to protect the life and health of those within their jurisdiction.[235]

An extensive analysis of the proportionality of vaccination policies is crucial for assessing their compatibility with the ECHR, taking account of country-specific factors and attitudes to vaccines within the relevant jurisdiction. The following are examples of factors that are relevant to assessing the proportionality of a compulsory vaccination scheme or of measures introduced to encourage vaccination uptake (for example making entry to venues or travel conditional upon vaccination status):

[233] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §277 (included as a summary in this publication)

[234] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §278 (included as a summary in this publication)

[235] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13; *Budayeva and Others v. Russia*, judgment of 20 March 2008, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, §§128-130 (included as a summary in this publication); *Hristozov and Others v. Bulgaria*, judgment of 3 November 2012, nos. 47039/11 and 358/12, §§106 and 116; *İbrahim Keskin v. Turkey*, judgment of 27 March 2018, no. 10491/12, §62; and *Kotilainen and Others v. Finland*, judgment of 17 September 2020, no. 62439/12, §78.

i) The views of experts, in particular medical authorities, and the existence of a scientific consensus recommending the vaccination policy.[236]

ii) The best interests of the child and the need to ensure that every child is protected against serious diseases which, in the great majority of cases, is achieved by children receiving a full schedule of vaccinations during their early years.[237]

iii) The existence of alternative methods of achieving the aim of increasing vaccination uptake and protecting health, for example voluntary vaccination programmes accompanied by effective information campaigns.[238]

iv) The nature of the requirement, whether it is absolute or whether there are exceptions to the general rule, for example, exemptions on religious or medical grounds.[239]

v) The methods of enforcement and sanctions for non-compliance with a vaccination duty, for example whether the purpose of

[236] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13 (included as a summary in this publication), where it was relevant that the vaccination duty in question concerned nine diseases against which vaccination is considered effective and safe by the scientific community (§290) and where the Court stressed that the case related to the "standard and routine vaccination of children against diseases that are well known to medical science" (§158).

[237] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §288 (included as a summary in this publication)

[238] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13 (included as a summary in this publication), §288. The Court found that if a policy of voluntary vaccination is not sufficient to achieve and maintain herd immunity, or herd immunity is not relevant due to the nature of the disease (e.g. tetanus), domestic authorities may reasonably introduce a compulsory vaccination policy in order to achieve an appropriate level of protection against serious disease. The Court noted that it may be appropriate to take a more prescriptive approach where States could evidence a decrease in voluntary vaccination and a resulting decrease in herd immunity See also: https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-vaccination-strategies-and-deployment-plans-Nov-2021.pdf: "Overview of the implementation of COVID-19 vaccination strategies and deployment plans in the EU/EEA", technical report by the European Centre for Disease Prevention and Control, 11 November 2021 (in particular pages 20-21), which provides an overview of alternative strategies and measures put in place across Europe for increasing vaccine uptake and acceptance, including outreach initiatives in partnership with community or faith leaders.

[239] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §291 (included as a summary in this publication), the Court found it notable that the Czech model did not impose an absolute duty, as an exemption from the duty was permitted in respect of children with a permanent contraindication to vaccination. An exemption could also be permitted on the basis of a right to a "secular objection of conscience" (§292).

sanctions is to protect health rather than to punish, whether a vaccine can be forcibly administered, the level of fines for non-compliance and, where a person is not allowed access to a space or service as a result of not having the vaccine, whether this restriction is imposed for a limited period of time.[240]

vi) Procedural and institutional safeguards, for example strict requirements and rigorous testing before registration of a vaccine, the existence of ongoing monitoring of the safety and side-effects of the vaccine,[241] the existence of effective administrative and/or judicial review procedures to contest the consequences of non-compliance with the vaccination duty[242] and the availability of compensation in case of injury to health as a side-effect of the vaccine.[243]

vii) The degree of transparency, public discussion and public participation surrounding the vaccination policy.[244]

[240] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §293 (included as a summary in this publication), where it was relevant that compliance with the vaccination duty could not be directly imposed, in the sense that there was no provision allowing for vaccination to be forcibly administered. The duty was enforced indirectly through administrative fines that could only be imposed once. The Court regarded the fine (a maximum of 10,000 Czech korunas, roughly equivalent to nearly 400 euros) as relatively moderate and did not consider it unduly harsh or onerous. In the case, the applicants' refusal to allow their children to be vaccinated also resulted in their children being refused admission to pre-school. The Court accepted that the exclusion of the applicants from preschool meant the loss of an important opportunity for the children to develop their personalities and to begin to acquire important social and learning skills. However, that was found to be the direct consequence of the choice made by their respective parents to decline to comply with a legal duty. It was also relevant that the effects on the child applicants were limited in time as, upon reaching the age of mandatory school attendance, their admission to primary school was not affected by their vaccination status.

[241] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §301 (included as a summary in this publication)

[242] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §295 (included as a summary in this publication)

[243] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §302 (included as a summary in this publication)

[244] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13 (included as a summary in this publication), §298, where the Court deemed that a sufficient degree of transparency was achieved through the publication of the minutes of the meetings of the National Immunisation Commission on the website of the Ministry of Health and sufficient public participation was achieved through the creation of a Working Commission for Vaccination to provide a broad platform for discussions between experts and the public about vaccination strategy in the Czech Republic.

Generally, the use of vaccination policies to protect life and health will be deemed a very weighty justification, likely to justify an interference with Article 8 in this context.[245] This is particularly so given the wide margin of appreciation afforded to States in this area and the Court's emphasis on the efficacy of vaccination as a means to protect not only those who are vaccinated but those who cannot be vaccinated and so who would benefit from high levels of immunity amongst the population. The Court considers that it is not disproportionate for a State to require those for whom vaccination represents a remote risk to health to accept a universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination.[246]

It also seems that the existence of effective review mechanisms to challenge the enforcement of compulsory vaccination in cases where people believe that a blanket rule should not be applied to them, could be a key factor in determining whether the administration of compulsory vaccination against Covid-19 breaches Article 8.[247]

There are a number of factors specific to the Covid-19 pandemic which would need to be taken into account when considering the proportionality of a Covid-19 vaccination policy.

As discussed above, there has been no common approach to mandatory vaccination against Covid-19 across States in Europe, a factor which is likely to lead to States being granted a wide margin of appreciation in respect of their Covid-19 vaccination policies. Only Austria imposed a vaccination mandate on all adults. Other States imposed vaccination mandates on specific age groups, and some required certain categories of workers, e.g. in healthcare or public services,

[245] See for example the UK case, Peters, Findlay & Fairburn v Secretary of State for Health and Social Care and the Joint Committee for Vaccination and Immunisation, [2021] EWHC 3182 (Admin) where the High Court judge found that the whole point of the measure under question (a vaccine mandate for careworkers) was to protect lives, namely, the lives (and so the Article 2 rights) of elderly residents in care homes, this was deemed to be a "very weighty justification" for any interference with Article 8.

[246] *Vavřička v. Czech Republic*, Grand Chamber judgment of 8 April 2021, no. 47621/13, §306 (included as a summary in this publication)

[247] *Glass v. United Kingdom*, judgment of 9 March 2004, no. 61827/00 (included as a summary in this publication), where it was held that a doctor's decision to treat a severely disabled child contrary to a parent's express wishes, and without the opportunity for judicial review of the decision, violated Article 8.

to get vaccinated so as to be able to continue exercising their professional activities, or allowed employers to impose such a mandate on their employees. In some other States, access to certain public spaces was only possible for those fully vaccinated against Covid-19.[248]

Vaccine policies targeted at certain groups, either on the basis of age[249] or profession,[250] could give rise to questions of discrimination and arbitrariness, unless the decision to target those groups is objectively justified.

The level of scientific knowledge and consensus underpinning a vaccination policy will also be relevant. The entirely new and sudden development of Covid-19 distinguishes Covid-19 vaccination policies from those previously considered by the Court, concerning routine vaccinations used in States for many years. For example, in February 2021, the World Health Organisation recalled that there were still many scientific uncertainties about the duration of immunity and the ability of Covid-19 vaccines to limit transmission.[251] The changing severity of the effects of the different strains of the virus over the course of the pandemic would also be a relevant factor. For example, Austria's mandatory vaccination policy was introduced when the "Delta" variant had dominated in the country. However, it was suspended when "Omicron" became the dominant strain, the effects of which were deemed to be milder and in relation to which vaccines appeared less effective at preventing infection. It would be more difficult to justify an interference with Article 8 in such a context.

[248] https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729309/EPRS_BRI(2022)729309_EN.pdf "Legal issues surrounding compulsory Covid-19 vaccination", European Parliament Briefing, March 2022.

[249] For example, vaccine mandates aimed only at those over a certain age have been criticised for a failure to justify why those of a certain age, and not those with other comorbidities at greater risk from Covid-19 risk facing a fine for failure to get vaccinated: https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729309/EPRS_BRI(2022)729309_EN.pdf "Legal issues surrounding compulsory Covid-19 vaccination", European Parliament Briefing, March 2022

[250] The case of *Thevenon v. France*, decision of 13 September 2022, no. 46061/21, concerned the question of whether the imposition of a compulsory vaccination on account of the applicant's occupation as professional firefighter breached his rights under Articles 8 and 14. The case was, however, dismissed for failure to exhaust domestic remedies, so this substantive question was not considered.

[251] https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-COVID-19-vaccination-for-international-travellers "Interim position paper: considerations regarding proof of COVID-19 vaccination for international travellers", World Health Organisation, 5 February 2021

In respect of 'vaccination certificates' or 'health passes' where vaccination status is a condition of entry to public spaces or services, the Court does not view a requirement to show a vaccination certificate to access certain public spaces as equivalent to imposing a general obligation to be vaccinated.[252] The length of time for which they are imposed, the types of spaces which require proof of vaccination status to enter, and the provision for exemptions from the requirement will be relevant to any proportionality assessment. For example, whether or not it is possible to provide alternative proof, such as proof of negative Covid-19 status to access such spaces or services.[253]

Finally, it will be necessary to take account of whether or not the vaccination policy actually serves the purpose for which it was introduced, i.e. to increase vaccination uptake. In some States, there has been a correlation between the introduction of vaccination passes and registration for the Covid-19 vaccine.[254]

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[252] *Zambrano v. France*¸ decision of 7 October 2021, no. 41994/21. The French Constitutional Council (Conseil constitutionnel) in its decision on the law creating the 'pass vaccinal' (Decision 2022-835 DC of 2 January 2022), upheld the law's constitutionality and distinguished between the situation of the general public and that of the professionals working in the establishments affected by the measure imposing a requirement to get vaccinated in order to continue employment. For the former, the measure did not amount to a vaccination mandate, considering the nature of the establishments in which the 'pass vaccinal' was required. On the other hand, the measure could be equated to compulsory vaccination for the latter group, as their work relationship would be suspended if they did not hold a 'pass vaccinal'. In either case, the Conseil upheld the measure, as it pursued a legitimate aim, i.e. the protection of health, and was not manifestly inadequate to attain the goal pursued, considering the scientific evidence available. The Conseil understood that the measure did not violate the rights recognised in the French Constitution (freedom of movement, assembly and right to work), as it was temporary, linked to the epidemic situation, imposed in relation to places and activities with high risk of contagion, and not applicable to those unable to be vaccinated for medical reasons, having recovered or presenting a medical contra-indication.

[253] https://rm.coe.int/dh-bio-2021-7-final-statement-vaccines-e/1680a259dd "*Statement on Human Rights Considerations Relevant to "Vaccine Pass" and Similar Documents*", Council of Europe Committee on Bioethics (DH-BIO), 4 May 2021, which states: one should also take into account those individuals who, for medical or other reasons, cannot be vaccinated, and keep in mind that test results (and in the case of travel also quarantine) provide alternative means to vaccination certificates when withdrawal of some public health measures is considered.

[254] For example, in France, more than a million people made a vaccine appointment in the 24 hours after announcement that a health pass would soon be required for public venues. Almost 10 million people got a first dose over the subsequent month: https://www.france24.com/en/europe/20211014-macron-s-covid-health-pass-a-success-in-overcoming-france-s-vaccine-scepticism

However, in Austria studies showed that those already sceptical of vaccines had not been swayed to register for vaccination by the threat of fines.[255] Indeed, the World Health Organisation has warned that compulsory jabs should be used as a last resort and that such schemes have the potential to backfire, further decreasing public confidence in government policies and the vaccine.[256]

Data collection, data storage and surveillance

In the context of data collection, storage and surveillance, data collection should be targeted, with prior assessment of whether the data collected would be "potentially decisive", "relevant" or "of importance", rather than collected indiscriminately.[257] Effective protection of data stored will also be a decisive factor in determining whether its storage is proportionate, and domestic law must afford appropriate safeguards to prevent any communication or disclosure of personal health data which is not required in pursuit of the legitimate aim.[258] The length for which data is retained is another relevant factor, where data is retained for many years, or for longer than required to serve the aim for which it is collected, the interference with Article 8 is more likely to be disproportionate.[259]

[255] https://www.theguardian.com/world/2022/jun/23/austria-scraps-compulsory-covid-vaccine-mandate

[256] https://www.politico.eu/article/who-cautions-against-mandatory-vaccination/ Trust deficit stalls vaccinations in Eastern Europe, driving new COVID surge – POLITICO Vaccine hesitancy has been linked to distrust in government and found to be more prevalent amongst communities which have experienced a history of state-complicit discrimination, marginalisation, or neglect, such as minority ethnic and religious groups (see Chaudhuri, K., Chakrabarti, A., Chandan, J.S. et al. COVID-19 vaccine hesitancy in the UK: a longitudinal household cross-sectional study, BMC Public Health 22, 104 (2022)). To address such mistrust, expert groups advocate that further, constructive engagement within these communities would be effective at increasing vaccine uptake (see BMA Response to COVID-19: mandatory vaccine guidance: https://www.bma.org.uk/advice-and-support/covid-19/vaccines/covid-19-mandatory-vaccine-guidance; Royal College of Nursing Position on Covid-19 and mandatory vaccines: https://www.rcn.org.uk/get-help/rcn-advice/covid-19-and-mandatory-vaccination). Conversely mandatory vaccination risks further undermining public trust. Alternative measures could include community-led education programmes and financial compensation programmes for those who miss work due to the side-effects of the vaccine (COVID-19 and mandatory vaccination: Ethical considerations and caveats World Health Organisation Policy brief, 13 April 2021).

[257] *L.H.v Latvia*, judgment of 29 April 2014, no. 52019/07(included as a summary in this publication)

[258] *Z v. Finland*, judgment of 25 February 1997, no. 22009/93, § 96; *Y v. Turkey*, admissibility decision of 17 February 2015, no. 648/10, § 78

[259] *Surikov v. Ukraine*, judgment of 26 January 2017, no. 42788/06, §§ 70 and 78

Any track and trace technology introduced to limit the spread of Covid-19 should therefore also include sufficient protections of the confidentiality of the data collected, and the data should only be stored for so long as necessary.

Family visits

The Court has previously found that restrictions which prevented an individual from visiting his adoptive daughter in a foster home, where the home was under quarantine because of an influenza outbreak, did not breach his Article 8 rights.[260] The Court found that the restrictions pursued the legitimate aim of protecting health and concluded that the two month period for which the restrictions were in place was not unreasonably long. The Court also took account of the fact that the applicant was able to make visits to see his daughter through a window on a weekly basis and that he was able to visit her again as soon as the influenza quarantine was lifted.

However, in the same case there was a breach of the applicant's Article 8 rights where he was not allowed any contact with his adoptive daughter for a period of over one year, when she was in intensive care in hospital. The length and the severity of the restriction on contact for this period was found to be disproportionate. Similarly, the confinement of an individual to an Italian enclave for six years, preventing him from visiting and maintaining contact with his family and friends living outside the enclave, was also found to breach Article 8. Whilst the restrictions on movement in the latter case were found to pursue the legitimate aim of protecting public safety, it was found that they could have been lifted sooner if the Italian authorities had communicated more effectively.[261]

Prison Visits

Blanket bans on prison visits are contrary to Article 8 and States must ensure that restrictions on visiting rights are justified in each individual case.[262] Safe methods

[260] *Kuimov v. Russia*, judgment of 8 January 2009, no. 32147/04 (included as a summary in this publication)

[261] *Nada v. Switzerland*, Grand Chamber judgment of 12 September 2012, no. 10593/08 (included as a summary in this publication)

[262] *Khoroshenko v Russia*, Grand Chamber judgment of 30 June 2015, no. 41418/04. At the time of writing, the case *Deltuva v. Lithuania*, communicated on 28 September 2021, no. 38144/20, is pending before the Court. The case concerns whether or not there been a violation of the applicant's right to respect for his family life, contrary to Article 8 of the Convention, in view of the refusal to grant him family visits in prison during the pandemic.

of ensuring visits continue or physical meetings can take place should therefore be explored before a restriction on in-person visits is pursued. For example, where appropriate, certain prisoners (such as those reaching the end of their sentence) could be released or socially distanced meets in prison, in conjunction with testing and the provision of appropriate PPE, could be introduced. Where visits are prevented, States should ensure that alternative methods of communication are introduced, for example video calls. Digital communication should not however be viewed as an adequate or long-term substitute for in person communication.[263]

[263] See https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_digital_contact_evidence_review_briefing%20paper_20200520-2-.pdf "The effects of digital contact on children's wellbeing: evidence from public and private law contexts", Rapid evidence review briefing paper, Iyer et al., Nuffield Family Justice Observatory, May 2020

4. Article 5 – Right to liberty

Quarantine, lockdown and/or social distancing measures introduced to prevent the spread of Covid-19 typically involved restricting liberty of movement (protected by Article 2 of Protocol No. 4). The impact of these measures on the right to freedom of movement is discussed in the section on Article 2 of Protocol No. 4 (Right to freedom of movement, including to leave and enter one's country) within this publication. Depending on the nature, severity and duration of these measures, they may also constitute an interference with the right to liberty, protected by Article 5. The first part of Article 5 provides:

"1. Everyone has the right to liberty and security of person."

a. Scope of Article 5

Article 5 enshrines the right to both liberty and security of person. However, in practice the concept of "security of person" has no real independent existence in the context of this Article.[264] Instead, physical safety and security are protected under Articles 3 and 8.[265]

The protections under Article 5 only apply in cases where there is a deprivation of liberty, rather than a lesser infringement of liberty or a restriction on freedom of movement.[266] Deprivation of liberty is a concept which has an autonomous definition under the Convention irrespective of how a situation is characterised

[264] *Bozano v. France*, judgment of 18 December 1986, no. 9990/82, §54

[265] For a discussion on the prohibition of torture and inhuman or degrading treatment under Article 3, and how this right encompasses the protection of the security and safety of the person see the section on Article 3 (Protection from inhuman and degrading treatment) within this publication, in particular the section "*Obligations to protect the health and well-being of those for whom the State assumes responsibility*". Where treatment threatening the safety or security of the person does not reach the minimum level of severity required to engage Article 3, see the discussion on the right to respect for private life in the section on Article 8 (Right to respect for private and family life) within this publication.

[266] For a full discussion on the impact of these measures on the right to freedom of movement, see the section on Article 2 of Protocol 4 (Right to freedom of movement, including to leave and enter one's country) within this publication.

in national law.[267] It is not defined by the legal context in which it occurs, nor is it confined to detention following arrest or conviction. A deprivation of liberty can take numerous forms, for example the placement of individuals in a social care home;[268] house arrest;[269] crowd control measures adopted by the police on public order grounds;[270] or confinement in transit zones.[271]

What exactly constitutes a 'deprivation of liberty' will depend on the specific facts and context of a particular case. There is both an objective and a subjective element to deprivations of liberty. As a general test, objectively a person must have been confined in a particular restricted space for a non-negligible amount of time and subjectively the person must not have consented or not be able to consent to the confinement.[272] However, this general test does not always work and the Court has noted that in some borderline cases the distinction between a restriction on liberty of movement and a deprivation of liberty is a matter of pure opinion.[273]

The distinction between restrictions of movement and deprivations of liberty

The distinction between restriction of movement and deprivation of liberty is one of degree and intensity, not of nature or substance, of the measure in the applicant's particular case.[274] Relevant factors in this assessment include the

[267] *Creangă v. Romania*, Grand Chamber judgment of 23 February 2012, no. 29226/03, §91

[268] *Hadžimejlić and Others v. Bosnia and Herzegovina*, judgment of 3 November 2015, nos. 3427/13, 74569/13 and 7157/14

[269] *Buzadji v. the Republic of Moldova*, Grand Chamber judgment of 5 July 2016, no. 23755/07 (included as a summary in this publication)

[270] *Austin and Others v. the United Kingdom*, Grand Chamber judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09 (included as a summary in this publication)

[271] *Amuur v. France*, judgment of 25 June 1996, no. 19776/92, *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15, §248 (included as a summary in this publication), *Z.A. and Others v. Russia*, Grand Chamber judgment of 21 November 2019, nos. 61411/15, 61420/15, 61427/15 and 3028/16, §248 (included as a summary in this publication)

[272] *Stanev v. Bulgaria*, Grand Chamber judgment of 17 January 2012, no. 36760/06, §117 (included as a summary in this publication)

[273] *Z.A. and Others v. Russia*, Grand Chamber judgment of 21 November 2019, nos. 61411/15, 61420/15, 61427/15 and 3028/16, §133 (included as a summary in this publication)

[274] *Guzzardi v. Italy*, judgment of 6 November 1980, no. 7367/76, §92 (included as a summary in this publication)

duration, type and effects of a measure. [275] The context in which measures are taken is also important as there are common situations in modern society where the public may be expected to endure restrictions on freedom of movement or liberty or even deprivations of liberty for a wider public purpose.[276] The Covid-19 pandemic has brought to the forefront the question of where the line between restrictions on movement and deprivations of liberty should be drawn.

Any of the measures obliging people to remain at home (such as lockdowns, quarantine etc.) could constitute a deprivation of liberty, rather than a restriction on movement. Even measures which are designed to ensure the safety or protection of the person whose liberty is restricted, may constitute a deprivation of liberty.[277] This assessment will, however, depend on a range of factors which must be considered on a case by case basis.

The Court has consistently reiterated that confinement under house arrest constitutes a deprivation of liberty.[278] Confinement to one's home under quarantine or shielding conditions, where a person is not permitted to leave under any circumstance, is therefore likely to amount to a deprivation of liberty. On the other hand, the Court has found that confinement to a person's home, except in case of necessity, between 10 p.m. and 6 a.m. did not constitute a deprivation of liberty,[279] nor did a 12-hour daily weekday curfew combined with whole weekend curfew for 16 months.[280]

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[275] *De Tommaso v. Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09, §§ 74-90 (included as a summary in this publication)

[276] *Austin and Others v. the United Kingdom*, Grand Chamber judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09, §59 (included as a summary in this publication)

[277] *Khlaifia and Others v. Italy*, Grand Chamber judgment of 15 December 2016, 16483/12, § 71

[278] See *Buzadji v. Republic of Moldova*, Grand Chamber judgment of 5 July 2016, no. 23755/07 (included as a summary in this publication), where a twenty-four-hour house arrest was found to constitute a deprivation of liberty. See also: Lavents v. Latvia, judgment of 28 November 2002, no. 58442/00, § 63; Nikolova v. Bulgaria (no. 2), judgment of 30 September 2004, no. 40896/98, § 60; Delijorgji v. Albania, judgment of 28 April 2015, no. 6858/11, § 75; and the statement of the UN expert group on arbitrary detention which states: "*Imposition of mandatory quarantine, from which a person cannot leave for any reason, in the context of a public health emergency is de facto deprivation of liberty*" https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25876&LangID=E "COVID-19 is not an excuse for unlawful deprivation of liberty - UN expert group on arbitrary detention" United Nations Human Rights Officer of the High Commissioner, 8 May 2020.

[279] *De Tommaso v Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09 (included as a summary in this publication)

[280] *Trijonis v. Lithuania*, admissibility decision 15 December 2005, no. 2333/02.

'Lockdown' measures, which impose curfews or restrict people to their homes only during certain hours are therefore less likely to constitute a deprivation of liberty. It is, however, impossible to draw an unequivocal conclusion on this question in the abstract, without full consideration of the particular facts of the case.[281] Relevant factors include:

i) the purpose of the restrictions and the context in which they are imposed;[282]
ii) the length of time for which the restrictions are imposed;[283]
iii) the existence of exceptions to the general rule that a person must remain at home and the scope of the reasons for which a person is permitted to leave their home;[284]
iv) the extent to which the restrictions allow a person to retain some resemblance to their life outside of lockdown;
v) whether there is a complete prohibition on receiving visitors;[285]
vi) the degree to which a person is permitted to make social contact;[286]

[281] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §41 (included as a summary in this publication), where the Court found that, in order to assess whether the lockdown measure complained of constituted a deprivation of liberty, it was necessary to analyse the facts of the situation, in light of the nature, effects, intensity and modes of execution of the restrictions.

[282] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §§ 39-41 (included as a summary in this publication), where the Court took account of the fact that the contested measures were imposed in the particular context of the Covid-19 pandemic, which posed very serious threats to the health, economy and functioning of society, after a state of emergency was declared in Romania, and that the purpose of the measures was to prevent the spread of infection and protect the rights to life and health of the population.

[283] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §41 (included as a summary in this publication), where the Court noted that the measure complained of lasted for a limited period of 52 days.

[284] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §§ 29, 42 - 43 (included as a summary in this publication), where citizens were prevented from leaving their home except in a certain number of exhaustively listed circumstances. Any person leaving home had to carry a document attesting to valid reasons for doing so. Valid reasons included: to buy essentials, for medical appointments, for childcare or to look after an adult in need of care, brief periods of individual exercise and agricultural and professional activities.

[285] *Guzzardi v. Italy*, plenary Court judgment of 6 November 1980, no. 7367/76; Nada v. Switzerland, Grand Chamber judgment of 12 September 2012, no. 10593/08 (included as a summary in this publication)

[286] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §43 (included as a summary in this publication), where it was relevant that it was not impossible for the applicant to make social contact.

vii) the generality of the restrictions – whether they are aimed at an individual, or whether they apply equally to everyone;[287]
viii) the degree of supervision under which the conditions are enforced, for example, whether an individual's compliance with the restrictions is monitored with surveillance or supervision; and[288]
ix) the severity of the punishments imposed for breach.

The context of the Covid-19 pandemic, in which States imposed restrictions on people leaving their homes to protect the life, health, economy and functioning of society, is relevant to the overall assessment of whether or not lockdown measures constitute a deprivation of liberty. In this context, lockdown restrictions are viewed as protective, rather than punitive, measures. The imposition of general measures, to limit the movement and social mixing of entire populations is, therefore, less likely to constitute a deprivation of liberty, than, for example, targeted measures imposed on an individual, whose compliance is subject to supervision or surveillance.

In this context, to show that an individual has been deprived of their liberty, they would need to provide evidence, in concrete terms, of how such general, protective measures had a particular impact on them. A general requirement to stay at home which includes exemptions, for example permitting people to leave their home to shop for essentials, visit family (even if in a socially distanced manner) and do exercise, does not constitute a deprivation of liberty, where a person can rely on these exemptions to leave their home at any time of the day. However, if an individual does not benefit from any exemptions to a rule requiring them to stay at home, and is in fact forced to remain confined to their home throughout the duration of a lockdown, this might constitute a deprivation of liberty.[289]

[287] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §42 (included as a summary in this publication), where the Court noted that the restrictions were not aimed at one individual, but were imposed against everyone.

[288] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §43 (included as a summary in this publication), where it was relevant that the applicant was not subjected to any individual surveillance, by contrast to, for example, *Guzzardi v. Italy*, judgment of 6 November 1980, no. 7367/76 (included as a summary in this publication) where the applicant was the subject of almost permanent surveillance.

[289] *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §44 (included as a summary in this publication), where the Court attached importance to the fact that the applicant had not explained in a concrete manner how the lockdown measures had impacted his personal state. It was found that he was in fact free to leave his house at any time, under any of the exemptions provided. His situation could be contrasted to a situation in which a

Further, where people are permitted to leave the house only for one hour a day, for example, this is clearly more restrictive than a nightly curfew, which has been found to constitute a restriction on movement, rather than a deprivation of liberty.[290]

Migrant reception, identification, or registration centres

Measures introduced to restrict movement in response to the Covid-19 pandemic also included the mass confinement of people in temporary holding centres, preventing them from leaving such spaces.[291] The Court has previously found that lengthy confinement in airport transit zones whilst awaiting the outcome of asylum claims constituted a deprivation of liberty within the meaning of Article 5,[292] whereas a stay in a land border transit zone did not, because the applicants had the possibility of leaving.[293] Confinement in a migrant reception,

person had to remain constantly in their house, throughout the lockdown period.

[290] See *De Tommaso v. Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09, (included as a summary in this publication) and see also the discussion on this case in the section on Article 2 of Protocol 4 (Right to freedom of movement, including to leave and enter one's country) within this publication.

[291] See "The impact of COVID-19 related measures on human rights of migrants and refugees in the EU", International Commission of Jurists Briefing paper, 26 June 2020. See also, for example, in Bosnia, on 16th March 2020, "*a complete restriction on the movement of migrants outside the temporary centres*" was ordered by the Crisis Staff of the Una Sana Canton's (USK) Health, Labour and Social Policy Ministry, see https://balkaninsight.com/2020/04/09/movement-ban-worsens-migrants-plight-in-serbia-bosnia/ "Movement Ban Worsens Migrants' Plight in Serbia, Bosnia", by I .Jeremic, M. Stojanovic and A. Vladisavljevic, Balkan Insight, 9 April 2020; In Serbia the issuing of the state of emergency included that, refugees and migrants have not been allowed out of the transit and asylum centres unless it is to seek medical care, or with special permission. See also https://www.srbija.gov.rs/vest/en/154373/preventive-measures-in-migrant-camps-yield-results.php "Preventative measures in migrant camps yield results" Government of the Republic of Serbia update, 16 April 2020. The ban works both ways, so the majority of staff from human rights organizations and NGOs cannot enter the facilities either. In the event that a certain person succeeds in leaving the camp without a permit, there is the risk of misdemeanour or criminal liability. See https://www.a11initiative.org/wp-content/uploads/2020/04/Li%C5%A1enje-slobode-izbeglica-tra%C5%BEilaca-azila-i-migranata-u-Republici-Srbiji-u-vreme-vanrednog-stanja_final.pdf "Lišenje slobode izbeglica, tražilaca azila i migranata u Republici Srbiji kroz mere ograničenja i mere odstupanja od ljudskih i manjinskih prava donetih pod okriljem vanrednog stanja", by N. Kovačević, A11 Initiative.

[292] *Z.A. and Others v. Russia*, Grand Chamber judgment of 21 November 2019, nos. 61411/15, 61420/15, 61427/15 and 3028/16

[293] *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15

identification or registration centre will therefore constitute a deprivation of liberty if there is no possibility of leaving the centre.[294] Such confinement may also raise issues under Article 3, as discussed in the section on Article 3 (Protection from inhuman and degrading treatment), in particular the section "*Migrant reception, identification, or registration centres*", within this publication.

b. Permitted exceptions

The second part of Article 5 § 1 provides:

> *No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *(a) the lawful detention of a person after conviction by a competent court;*
>
> *(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
>
> *(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*

[294] See *J.R. and Others v. Greece* judgment of 25 January 2018, no. 22696/16, regarding applicants placed in the Vial "hotspot" facility (a migrant reception, identification and registration centre). After one month, the facility became semi-open and the applicants were allowed out during the day. The Court considered that the applicants had been deprived of their liberty within the meaning of Article 5 during the first month of their stay in the facility, but that they were subjected only to a restriction of movement, rather than a deprivation of liberty, once the facility had become semi-open; *Z.A. and Others v. Russia*, Grand Chamber judgment of 21 November 2019, nos. 61411/15, 61420/15, 61427/15 and 3028/16

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

To be compliant with Article 5, the detention of a person must fall within one of the exceptions listed above. The Court has repeatedly emphasised that the list of exceptions to the presumption of liberty set out in Article 5 § 1 is wholly exhaustive.[295] The permitted exceptions are interpreted strictly, meaning Article 5 does not allow for the broader range of justifications which may be permitted under Articles 8-11. Article 5 § 1 (e) is the most relevant exception in the context of the Covid-19 pandemic.

Lawful detention of persons for the prevention of the spreading of infectious diseases

Article 5 § 1 (e) authorises the "*lawful detention of persons for the prevention of the spreading of infectious diseases*". Such individuals may be a danger to public safety, but it may be their own interests which necessitate detention.[296] However, detention is only permitted under this provision as a last resort, where less severe measures to prevent the spread of the disease have been considered and found insufficient to safeguard the public interest.[297]

Covid-19 has been shown to be an infectious disease, which is dangerous to public health and safety, meaning it may be lawful under Article 5 § 1 (e) for States to impose deprivations of liberty to prevent its spread. However, States must also be able to demonstrate that such measures were adopted as a last resort, after other options were considered and it was concluded that the spread of Covid-19 could not have been controlled under less restrictive conditions. For example if people were placed under quarantine conditions without permission to

[295] *Frroku v. Albania*, judgment of 18 September 2018, no. 47403/15, §52 (included as a summary in this publication), see also *Rooman v. Belgium*, Grand Chamber judgment of 31 January 2019, no. 18052/11, § 190, and the references therein (included as a summary in this publication)

[296] *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00, §43 (included as a summary in this publication)

[297] *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00, §44 (included as a summary in this publication)

leave their home under any circumstance, States must be able to evidence why they could not have been permitted to leave their house for a set period of time each day, under certain conditions e.g. wearing a mask and remaining apart from others. It may be that other solutions were not deemed to be viable, but States must at least be able to provide evidenced reasons why.

This requirement is particularly pertinent in the context of the treatment of migrants and prisoners. Certain States envisaged prolonging prison sentences in their notification of derogations to the Council of Europe as a response to the Covid-19 pandemic. Such extensions would need to be justified under Article 5 § 1 (e) rather than Article 5 § 1 (a) (the lawful detention of a person after conviction by a competent court) as they would be unconnected to the original sentence. Unless a prisoner had tested positive for Covid-19, it is difficult to see how prolonging their sentence could be argued to constitute the least restrictive means of preventing the spread of Covid-19. Further, concerns have been raised about the use of detention as a default response to infection within migrant and refugee communities, rather than a measure of last resort, for example where migrants report being placed in quarantine in detention centres because of concerns about their 'self-discipline' to comply with self-isolation conditions.[298] This risks exposing people to further harm rather than safeguarding their health.

c. Safeguards under Article 5

Even if a deprivation of liberty is found to be authorised under Article 5 § 1 (e), it must also comply with the safeguards set out in Article 5. Under Article 5 § 1, a deprivation of liberty must be in accordance with a procedure prescribed by law and the detention itself must be lawful. To be "in accordance with a procedure prescribed by law" any deprivation of liberty must be in compliance with national law,[299] and other applicable international legal standards[300] and national law must in itself be in conformity with the Convention, including the general principles expressed or implied therein.[301] These principles include the rule of

[298] See https://www.borderviolence.eu/wp-content/uploads/COVID-19-Report.pdf "Special report: COVID-19 and border violence along the Balkan route" Border Violence Monitoring Network, Balkan Region, April 2020

[299] *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, no. 11364/03, § 72 (included as a summary in this publication)

[300] *Mitrović v. Serbia*, judgment of 21 March 2017, no. 52142/12, §40

[301] *Bigović v. Montenegro*, judgment of 5 March 2019, no. 48343/16, §§181-182 (included as a summary in this publication); *Šaranović v. Montenegro*, judgment of 19 March 2019, no. 31775/16, §69

law, legal certainty and protection against arbitrariness. Restrictive measures falling within Article 5 adopted in response to the Covid-19 pandemic therefore must still be authorised and implemented by a process which complies with the applicable national legal norms and with properly enacted laws or regulations.[302]

Legal Certainty

It is essential that the conditions for deprivation of liberty under national law are clearly defined and that the law is foreseeable in its application. The law needs to be sufficiently precise to allow an individual, if need be with advice, to foresee to a degree that is reasonable in the circumstances the consequences which a given action may entail.[303] There must, for example, be clear conditions and time limits stipulating when a person needs to be in quarantine and for how long, so that a person is fully aware of the circumstances in which they might be asked to remain at home, when they will eventually be able to leave their home, whether there are any reasons for which the conditions restricting their liberty might be extended, and if so, for how long.

No arbitrariness

No detention which is arbitrary can be compatible with Article 5 § 1. The notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[304] Detention will be considered arbitrary where there is no relationship between the ground of permitted deprivation of liberty and the place and conditions of detention[305] and, in relation to Article 5 § 1 (b), (d) and (e), where detention was not necessary to achieve the stated aim.[306] In order for any deprivations of liberty imposed as

[302] For example, on 29 January 2021, the French Conseil constitutionnel, with decision n° 2020-878/879 QPC, found that the Government order (Article 16 of the ordonnance from 25 mars 2020) permitting the automatic prolongation of pretrial detention was incompatible with Article 66 of the Constitution (the prohibition on arbitrary detention) and quashed the order with immediate effect.

[303] *Dragin v. Croatia*, judgment of 24 July 2014, no. 75068/12, §90

[304] *Creangă v. Romania*, Grand Chamber judgment of 23 February 2012, no. 29226/03, § 84; *Sebalj v. Croatia*, judgment of 28 June 2011, no. 4429/09, §188

[305] *Hadžic and Suljić v. Bosnia and Herzegovina*, judgment of 7 June 2011, nos. 39446/06 and 33849/08, §41

[306] *Hadžimejlić and Others v. Bosnia and Herzegovina*, judgment of 3 November 2015, nos. 3427/13, 74569/13 and 7157/14, §§52-59

a response to the pandemic to comply with this condition, it must therefore be evidenced that they help to prevent the spread of the Covid-19.

Reasons

An absence or lack of reasoning is one of the elements taken into account by the Court when assessing the lawfulness of detention.[307] Article 5 § 2 also contains the elementary safeguard that any person arrested must know why he is being deprived of his liberty. A person must be informed of the essential factual and legal grounds for the deprivation of their liberty in simple, non-technical language that they understand. [308] Requests for translation should be formulated with meticulousness and precision by the authorities.[309] States must therefore take measures to ensure that they communicate clear and regular updates to the general public on who is required to quarantine or shield and why they need to do this. This may involve television or radio broadcasts or delivering letters and leaflets (translated into the languages spoken in the areas they are delivered to).[310]

Review of the lawfulness of detention

Article 5 § 3

Article 5 § 3 provides:

> *"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."*

[307] *S., V. and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §92

[308] *Velinov v. the Former Yugoslav Republic of Macedonia*, judgment of 19 September 2013, no. 16880/08, §63

[309] *Shamayev and Others v. Georgia and Russia*, judgment of 12 April 2005, no. 36378/02, §425

[310] See the BBC Asian Network's creation of a series of videos in seven different South Asian languages, explaining what Covid-19 is and how people can protect themselves in a bid to tackle the spread of disinformation during the coronavirus crisis and to help public health messages reach as wide an audience as possible: https://www.bbc.co.uk/mediacentre/latestnews/2020/asian-network-advice-videos "BBC Asian Network publishes coronavirus advices videos in South Asian languages to help those whose first language is not English" BBC Media Centre, 30 April 2020.

Article 5 § 3 protects the rights of those arrested or detained on suspicion of having committed a criminal offence. It guarantees the right to a prompt and automatic review of the legality of their detention. Such review must examine whether there is a reasonable suspicion that the arrested person has committed an offence, in order to determine whether their detention is justified under Article 5 § 1 (c).[311]

In the exceptional circumstances of the pandemic, the Consultative Council of European Prosecutors also recommend that prosecutors and prosecution services should particularly strive to explore the possibility of using alternatives to the prosecution in general and to pre-trial detention in particular.[312]

Promptness

Article 5 § 3 does not provide for any exceptions to the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention. The requirement for promptness is strict, with little room for flexibility in its interpretation. Generally, four days is the maximum period of time during which a person can be detained without judicial control.[313] Shorter periods can also breach the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner.[314]

Entitlement to a trial within a reasonable time

The question of whether a period of time spent in pre-trial detention is reasonable must be assessed in light of the specific facts and circumstances of each case. Continued detention can only be justified where there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweigh the right to respect for individual liberty under Article 5. However, the purpose requirement under Article 5 § 1 (c) (i.e. that the purpose of detention must be to be to bring an applicant before a competent

[311] *McKay v. the United Kingdom*, Grand Chamber judgment of 3 October 2006, no.543/03, § 40

[312] Opinion No. 15 (2020) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe: The role of prosecutors in emergency situations, in particular when facing a pandemic, 19 November 2020, § 40

[313] *McKay v. the United Kingdom*, Grand Chamber judgment of 3 October 2006, no.543/03, § 33

[314] For example, *İpek and Others v. Turkey*, judgment of 3 February 2009, nos. 17019/02 and 30070/02

legal authority) can be interpreted and applied with a certain flexibility when the intention which once existed of "bringing the applicant before the competent legal authority" does not materialise for some reason.[315]

As a minimum, it is essential that, throughout their time in detention, there continues to be a reasonable suspicion that the person committed the offence in question. The existence of this reasonable suspicion must initially be assessed "promptly" (see above). However, after a certain lapse of time, the mere existence of a reasonable suspicion no longer suffices to justify pre-trial detention. The Court must then also establish: (i) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty (e.g. the risk of absconding or the risk of reoffending); and (ii), where there are "relevant" and "sufficient" grounds to justify detention, whether the national authorities displayed "special diligence" in the conduct of the criminal proceedings.[316] Quasi-automatic prolongation of detention contravenes the guarantees set forth in Article 5 § 3.[317]

In the context of the Covid-19 pandemic, the temporary suspension of criminal proceedings for a period of approximately three months due to the exceptional circumstances of the pandemic did not breach the duty of special diligence. This was the case where proceedings had been actively pursued both before and after the emergency measures suspending proceedings were in place (and there were no complaints of failings, delays or omissions on the part of the authorities, during those times) and where the Court found that, even during the three months suspension of criminal proceedings, detention could continue to be deemed to be for the purposes of being brought before the competent authority.[318]

[315] *S., V. and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, no. 35553/12, § 118

[316] *Buzadji v. the Republic of Moldova*, Grand Chamber judgment of 5 July 2016, no. 23755/07, §§ 87 - 91

[317] *Tase v. Romania*, judgment of 10 June 2008, no. 29761/02, § 40. See also, the decision of the French Conseil constitutionnel (decision n° 2020-878/879 QPC of 29 January 2021), in which the Conseil constitutionnel quashed a government order or "*ordonnance*" passed during the pandemic, providing for the automatic extension of the pretrial detention, stating that pre-trial detention can be prolonged only after the decision of a judge.

[318] *Fenech v. Malta*, decision of 23 March 2021, no. 19090/20, §§ 92 and 96 (included as a summary in this publication)

Article 5 § 4

Article 5 § 4 provides:

> *"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

Under Article 5 § 4, people in detention have the right to actively seek judicial review of their detention, irrespective of the reason for which they are being detained under Article 5 § 1 (a)-(f).[319]

Effective Review

Article 5 § 4 requires that the review procedure must have a "judicial character". The forms of judicial review satisfying the requirements of Article 5 § 4 can vary from one context to another and will depend on the type of deprivation of liberty in issue, as well as the particular nature of the circumstances in which such proceeding takes place. Proceedings under Article 5 § 4 need not always contain the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. However, as a minimum, it is essential that the person concerned has access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation.[320]

In the unique context of the Covid-19 pandemic, the Court accepts that courts and hearing centres faced difficult and unforeseen practical problems and were largely unprepared to facilitate the social distancing required to protect the health of those involved in judicial proceedings.[321] In these circumstances it is not incompatible with Article 5 § 4 to review an individual's detention without

[319] *Čović v. Bosnia and Herzegovina*, judgment of 3 October 2017, no. 61287/12, §29

[320] *Stanev v. Bulgaria*, Grand Chamber judgment of 17 January 2012, no. 36760/06, §171

[321] *Bah v. the Netherlands*, decision of 22 June 2021, no. 35751/20, §§ 41 – 44, where the applicant (an immigrations detainee)'s hearing took place in the first weeks of the Covid-19 pandemic lockdown, at which time the immigration detention centres were largely unprepared to observe the required 1.5-metre distance in tele- and videoconference rooms. The applicant, whose hearing took place on 19 March 2020, was not offered a video hearing owing to a lack of adequately equipped tele- and videoconference rooms in his immigration detention centre at that date.

securing his attendance at the hearing in person or by videoconference (in particular in light of the fact that Article 5 § 4 does not impose the same stringent requirements on hearings as Article 6 under its civil or criminal head). Instead, it is sufficient to comply with Article 5 § 4 if a person benefits from adversarial proceedings, during which they are assisted and represented by a lawyer, even if the hearing takes place by telephone and / or even if their lawyer is present at the hearing, but they are not.[322] In such a scenario, the individual must have had sufficient contact with their lawyer, to enable their lawyer to effectively present their position and views on their behalf.[323]

Speedy Review

The factors used to determine whether a decision is speedy or not include: the complexity of the proceedings; the conduct of both the authorities and the individual; what is at stake for the latter; and the specificities of the domestic procedure. Particular issues may arise under this provision in the context of pre-trial detention, as the Covid-19 pandemic has caused delays and interruptions to normal court proceedings which may infringe this provision.[324]

The issues discussed above are discussed further in the section on Article 6 (Right to a fair hearing) within this publication.

[322] *Bah v. the Netherlands*, decision of 22 June 2021, no. 35751/20, §§40, where it was relevant that the court had made concrete efforts to enable the applicant's presence at his hearing, and explained in detail why it had not been possible to hear him in person or by videoconference,

[323] *Bah v. the Netherlands*, decision of 22 June 2021, no. 35751/20, §44

[324] At the time of writing the case of *Khokhlov v. Cyprus*, communicated on 10 February 2021, no. 53114/20, is currently pending before the Court. The applicant has been detained since 22 October 2018 for the purpose of his extradition to Russia to stand trial. On 30 October 2020 he was informed that, due to the restrictive measures relating to Covid-19 in place by both Cyprus and Russia, the two states had decided to suspend his extradition. The case concerns whether he had an effective procedure by which he could challenge the lawfulness of his detention, as required by Article 5 § 4, and in particular, whether the length of the appeal proceedings by which he sought to challenge the lawfulness of his detention, comply with the "speed" requirement of Article 5 § 4.

5. Article 2 of Protocol No. 4 – Right to freedom of movement, including the right to leave and enter one's country

Travel bans, lockdowns and curfews were imposed across Europe as a response to the Covid-19 pandemic. The section on Article 5 (Right to liberty) within this publication contains a discussion on if, and when, such measures may constitute a deprivation of liberty under Article 5. In situations where these measures do not amount to a deprivation of liberty, it is clear that they do represent an interference with the right to freedom of movement under the ECHR, which includes the right to leave a Council of Europe country, enter one's own country and to move freely around the territory of a country one has legally entered.[325]

a. Freedom of movement

Article 2 of Protocol No. 4 (A2P4) to the Convention protects the right to liberty of movement within a State and the right to leave a State. It provides:

> *1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
>
> *2. Everyone shall be free to leave any country, including his own.*
>
> *3. No restrictions shall be placed on the exercise of these rights*

[325] A request for a preliminary ruling has been made by the Brussels Court of First Instance to the CJEU in the case of *NORDIC INFO v Belgische Staat* (C-128/22) seeking clarification on whether measures which, in principle, impose on Belgian nationals, Union citizens and their family members residing in Belgian territory an exit ban for non-essential travel from Belgium to countries within the EU and the Schengen Area that are coloured red in accordance with a colour code drawn up on the basis of epidemiological data, and which also imposes on non-Belgian Union citizens and their family member entry restrictions, (such as quarantines and tests) for non-essential travel from countries within the EU and the Schengen Area to Belgium which are coloured red in accordance with a colour code drawn up on the basis of epidemiological data, are compatible with the free movement provisions contained with the Citizenship Directive 2004/38.

other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Scope

The Court has found an interference with the right to freedom of movement under A2P4 where individuals were required to seek permission from a court before leaving their place of residence to go elsewhere,[326] prevented from crossing internal borders within the country they resided in,[327] prohibited from entering specific areas of a city,[328]and prevented from leaving a State.[329]

Measures taken to restrict movement to prevent the spread of Covid-19 would clearly also constitute an interference with the rights protected under A2P4. For example, the imposition of lockdown requirements across a country, preventing people from leaving their homes on certain days, or during certain times through the imposition of daily curfews, restricting access to public transport systems except for use to travel for certain, specified reasons, restricting internal and international travel except where 'necessary' and preventing travel in and out of certain towns or regions of a country where the risk posed by Covid-19 has spiked and that region remains in 'lockdown'.

[326] *Antonenkov and Others v. Ukraine*, judgment of 22 November 2005, no. 14183/02 (included as a summary in this publication)

[327] *Timishev v. Russia*, judgment of 13 December 2005, nos. 55762/00, 55974/00

[328] *Landvreugd and Olivieira v. Netherlands*, judgments of 4 June 2002, nos. 37331/97, 33129/96 (included as a summary in this publication)

[329] *Milen Kostov v. Bulgaria*, judgment of 3 September 2013, no. 40026/07 (included as a summary in this publication)

Limitations

Article 2 § 3 of A2P4 provides that the protections under A2P4 may be subject to restrictions for the protection of health. As with Articles 8-11 of the Convention, any restriction for this purpose must be in accordance with the law and be necessary in a democratic society.[330]

In accordance with law

Where a law or regulation has a very significant impact on the right to liberty of movement, it is particularly important that the effects of the law or regulation are accessible and foreseeable.[331] This requirement for clarity and foreseeability is particularly relevant in the context of the Covid-19 pandemic, where lockdown, curfew and travel restrictions had a 'very significant impact' on liberty of movement and freedom to travel, and where States developed broad, new powers to enforce these restrictions. The laws governing these powers needed to be drafted and implemented quickly and updated regularly to respond to changing levels of risk, which led in some cases to confusion regarding their scope and effects.[332]

[330] *Timishev v. Russia*, Grand Chamber judgment of 19 October 2005, nos. 55762/00 and 55974/00

[331] *De Tommaso v. Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09, §111 (included as a summary in this publication). See also the decision of the French Conseil constitutionnel n° 2020-846/847/848 QPC, 26 June 2020, in which the Conseil constitutionnel found that the measures introduced in France to restrict freedom of movement did comply with the principle of legality, because the relevant legislation defined with sufficient precision and clarity the scope of the restrictions on movement, the exemptions to the general restrictions and the conditions under which breach of these conditions would constitute an offence.

[332] See the confusion in the United Kingdom surrounding whether political adviser Dominic Cummings was in breach of lockdown regulations or not: https://www.instituteforgovernment.org.uk/blog/government-handling-dominic-cummings-loss-public-trust "The government's handling of the Dominic Cummings row has led to a loss of public trust", by C.Haddon, Institute for Government, 26 May 2020. See also the refusal of the Superior Court of Justice of Madrid to ratify measures limiting entry and exit between cities, adopted by decree of the regional government on 1 October 2020 Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso, order of 8.10.2020, no 128/2020). It recalled the jurisprudence of the Constitutional Court relating to Articles 53 and 81 of the Constitution, according to which fundamental rights can only be limited by a law, organic or ordinary, respecting the conditions of legal certainty and foreseeability of the law. The Superior Court examined article 65 of the law invoked as the legal basis for the measures and concluded that it did not fulfil these conditions and that, therefore, it did not constitute a valid legal basis for introducing restrictions on fundamental rights.

The Court has previously found a breach of A2P4 where a two-year compulsory residence order was made against an applicant who was deemed dangerous because of his 'criminal tendencies'. The domestic provision restricting his freedom of movement was not "in accordance with law" because it did not contain sufficiently detailed provisions explaining what types of behaviour were to be regarded as posing a danger to society and did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts.[333]

This reasoning can be applied by analogy to the restrictions on movement to limit the 'danger' or risk to health posed by Covid-19. To comply with A2P4, such provisions need to make clear to people when they are allowed to leave their home, where they are allowed to go, the reasons for which they are permitted to travel or leave their home, what the consequences for breaching the restrictions would be and in what situations exactly would those consequences be enforced. For example, restrictions on travel except where 'necessary' risk causing confusion as to what constitutes 'necessary' and should be accompanied by clear guidance and examples on what the term means in the context of the pandemic, to avoid granting excessive discretion to those enforcing such restrictions.

Necessary in a democratic society

When assessing whether a restriction on movement is necessary in a democratic society, the Court will take account of the duration of the restriction, whether it is applied in an automatic and indiscriminate fashion or takes account of individual circumstances, and whether the restriction actually serves the aim for which it was introduced.

Even where a restriction on an individual's freedom of movement is initially warranted, the longer the restriction lasts, the more likely it is to become disproportionate.[334] The Court did not consider a restriction on access by an individual to a particular area in a city which lasted 14 days to be disproportionate, where it was imposed in response to an emergency situation of drug use and trafficking.[335] However, a travel ban viewed as initially warranted by the Court,

[333] *De Tommaso v. Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09 (included as a summary in this publication)

[334] *A.E. v. Poland*, judgment of 31 March 2009, no. 14480/04 (included as a summary in this publication)

[335] *Landvreugd and Olivieira v. Netherlands*, judgments of 4 June 2002, nos. 37331/97 and 33129/96 (included as a

was found to be disproportionate after it lasted for eight years with only one review of its continued necessity.[336] Where measures restricting movement are imposed by reference to factors that are susceptible to change over time, it is incumbent on the State to review periodically whether the grounds for restrictions on freedom of movement persist.[337] States must therefore regularly review the need for travel bans and restrictions on movement in light of the level of the risk that Covid-19 would spread because of such movement. The longer such restrictions last, the more vital regular review becomes.

Review of such measures is also necessary to ensure that the restriction on movement serves the purpose for which it has been introduced and is the least restrictive means of achieving that purpose. When restrictions on movement are imposed against specific populations, for example due to their age or health conditions, it must be clear that there is a heightened risk to the health of such populations which necessitates their confinement to a greater extent than others.[338] Further, concerns have been raised that the imposition of certain restrictions on movement can cause an increase in other types of movement, and that measures such as lockdowns can have the opposite effect to the intended aim of preventing the spread of Covid-19. For example, announcing that one part of a country would be locked down may lead to mass travel to another part of the country and announcing the closure of certain shops, restaurants or parts of a city may lead to stockpiling and overcrowding in supermarkets which remain open.[339]

summary in this publication)

[336] *De Tommaso v. Italy*, Grand Chamber judgment of 23 February 2017, no. 43395/09 (included as a summary in this publication)

[337] See *Villa v. Italy*, judgment of 20 April 2010, no. 19675/06, where the restriction was imposed on an individual by reference to the danger he posed to society and it was necessary to continuously review the level of danger he posed.

[338] See the decision of Bosnia's Constitutional Court that the ban on minors and people over 65 leaving their homes breached their right to freedom of movement. The measure was found to be disproportionate because the authorities had not made clear why they estimated that these age groups had a larger risk of being infected or of transmitting the infection: https://www.sarajevotimes.com/constitutional-court-ban-on-the-movement-of-persons-under-the-age-of-18-and-over-65-is-violation-of-human-rights/ "Constitutional Court: Ban on the Movement of Persons under the Age of 18 and over 65 is a violation of Human Rights", Sarajevo Times, 22 April 2020.

[339] See: https://blogs.lse.ac.uk/europpblog/2020/03/26/beating-covid-19-the-problem-with-national-lockdowns/ "Beating Covid-19: The problem with national lockdowns" by M.J.Bull, LSE Blogs, 26 March 2020, and the example of approximately 25,000 Italians leaving Lombardy when it was locked down to travel to other parts of

The consequences of imposing restrictions on movement should therefore be factored into decisions to impose them, to ensure that they are able to serve the purpose for which they are introduced.

The Court is also more likely to find a restriction on movement to be disproportionate when it is applied in a blanket, automatic fashion, without taking account of individual circumstances.[340] Many responses to Covid-19 involved blanket restrictions on movement across entire States which affected the entire population. Such indiscriminate measures may cause concern where they do not account for the individuals who may be impacted differently by a blanket restriction. For example, those with mental or physical disabilities, which necessitate that they spend more time outside than others[341] and those who need to leave their homes to collect essential items or social security payments. [342] If

the country, leading the government to lockdown the whole country. See also: https://www.reuters.com/article/us-health-coronavirus-serbia/serbia-imposes-night-curfew-orders-elderly-indoors-idUSKBN2143XR "Serbia imposes night curfew, orders elderly indoors", A.Vasovic, Reuters, 17 March 2020 where the announcement of a state of emergency in Serbia caused pensioners to 'scramble to collect pensions and run errands', prompting authorities to impose tougher restrictions.

[340] For example, the Superior Court of Justice of Castile and León found to be unlawful a measure, adopted by the regional government, which prevented all residents of retirement homes from going outside these establishments and receiving visits, regardless of the degree of contagion in the centre (Order of 6.11.2020, 297/2020). The measure was found not to meet the criteria of necessity, adequacy and proportionality.

[341] See the challenge brought in the United Kingdom which led the government to amend leaving home guidance to make it clear that those with health conditions that require them to leave their homes more than once a day, and travel beyond their local area, are expressly permitted to do so. https://www.gov.uk/government/publications/coronavirus-outbreak-faqs-what-you-can-and-cant-do/coronavirus-outbreak-faqs-what-you-can-and-cant-do "Coronavirus outbreak FAQs: what you can and can't do", Cabinet Office Guidance, 26 August 2020; See also https://www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary "Government guidance changed to permit people with specific health needs to exercise outside more than once a day and to travel to do so where necessary" Bindmans LLP, 8 April 2020.

[342] See *Landvreugd and Olivieira v. Netherlands*, judgments of 4 June 2002, nos. 37331/97 and 33129/96 (included as a summary in this publication), where the fact that a provision had been made for the applicant to enter the relevant area with impunity to collect his social security benefits and mail was relevant to the Court's finding that there was no breach of A2P4; see also in Bosnia the amendment to the rule preventing over 65s from leaving their homes, which permitted pensioners to leave their homes for four hours on weekdays to collect their pensions and buy medicines: See https://balkaninsight.com/2020/04/14/bosnias-constitutional-court-to-rule-on-movement-restrictions/ "Bosnia's Constitutional Court to Rule on Movement Restrictions", by E.Dizdarevic and

restrictions on movement do not allow for exceptions in such instances, States must be able to demonstrate that they have considered imposing less restrictive measures,[343] but concluded that the risk posed to public health from the spread of Covid-19 by accommodating for such individual circumstances outweighs the risk to health posed by a blanket application of restrictions on movement.[344]

b. Right to enter one's own country

Article 3 § 2 of Protocol No. 4 (A3P4) to the Convention protects the right to enter one's own country. It provides that:

> *"[n]o one shall be deprived of the right to enter the territory of the state of which he is a national".*

In practice, very few cases have considered the interpretation of this provision. Many of the restrictions on entry imposed by States as a response to the pandemic applied to non-nationals or non-residents of the State, whilst citizens of the State were still permitted entry to 'their own country'. Even in situations where a complete ban on commercial fights was introduced, airports continued to operate for the purpose of repatriation,[345] and some States chartered flights to ensure nationals could continue to enter their own country. Given that the protections under A3P4 apply to nationals of the country they are seeking to enter, it seems

N. Dervisbegovic, Balkan Insight, 14 April 2020.

[343] See *Landvreugd and Olivieira v. Netherlands*, judgments of 4 June 2002, nos. 37331/97 and 33129/96 (included as a summary in this publication), where the Court found that the 14-day order restricting access to a part of the city was proportionate in part because the applicants had already been issued with several eight-hour prohibition orders, but nevertheless returned each time to the prohibited areas to engage in hard drug activities in public, and where they were warned that a further repeat would result in the fourteen-day restriction order.

[344] See for example: the decision of the Belgian Council of State (Raad van State, judgment of 30.10.2020, no 248.81), in which the Belgian Council of State dismissed a request for a suspension of the ministerial decrees establishing a curfew between midnight and 5 am, on the basis of a violation of the freedom to come and go and the right to respect for private life. According to the Council of State, the curfew pursued a legitimate objective (the limitation of social contact) in order to preserve the health care system; an aim which could not be achieved by a less restrictive measure, such as a ban on assembly.

[345] See for example in Albania where all commercial flights were cancelled on 22 March 2020, but Tirana International Airport (TIA) remained open for handling humanitarian, repatriation and cargo flights: https://uk.reuters.com/article/health-coronavirus-albania-flights/albania-suspends-all-commercial-flights-out-of-tirana-idUKL8N2BF078 "Albania suspends all commercial flights out of Tirana", by D.Goodman, 22 March 2020.

unlikely that the travel bans imposing restrictions on entry to States would raise problems under A3P4.

An unusual situation was however created at the end of March at the Albanian-Greek border. Albanian nationals traveling home from neighbouring Greece were refused entry to the territory of their own State and kept at the transit zone without any assistance or clear perspective about their situation.[346] It was only after heavy public criticism that the Albanian Government did allow them to enter Albania and to quarantine in hotels. The manner in which the ban on entry was applied, could raise issues not only under A3P4, but also under Articles 3 and 5 of the Convention.[347]

Further, as travel bans have gradually been lifted, States have begun to introduce preconditions to entry into their territory, such as the production of the results of a negative molecular test result (PCR) for Covid-19, performed before entry to the State, or the completion of an online form prior to travel. In some cases, these conditions apply equally to nationals and non-nationals of the State.[348]

Whilst these preconditions do not amount to a complete deprivation of the right to enter a country, they may raise issues under A3P4 if they impose obstacles to entry in practice. For example, if a person does not have access to the requisite technology to complete an online form prior to arrival, if they cannot access a test in time, or if they test positive for Covid-19. In such situations a national of a member State could be deprived entry to the State of which he is a national. This may be justified to pursue the aim of protecting health if a person has tested

[346] See https://www.albaniandailynews.com/index.php?idm=41148&mod=2 "Nearly 40 Albanians stuck at border with Greece", by E. Halili, Albanian Daily news, 7 April 2020

[347] For further discussion on the issues that might arise under Articles 5 and 3 in the context of detaining people in transit at border zones, see the sections on Article 5 (Right to liberty), in particular the subsection '*Migrant reception, identification, or registration centres*' and Article 3 (Protection from inhuman and degrading treatment (migrants and asylum seekers)) within this publication.

[348] See the Protocol for Arrivals in Greece introduced on 1 July 2020 which required all travellers to complete an online Passenger Locator Form the day before entering the country, leading them to receive a code via email to confirm submission, and required passengers from certain countries to have a negative molecular test result (PCR) for Covid-19, performed up to 72 hours before their entry to Greece. These requirements apply to Greek citizens and permanent residents of Greece: https://travel.gov.gr/#/ "Protocols for Arrivals in Greece" the Government of Greece Website, 13 August 2020.

positive for Covid-19.[349] It is unlikely however to be justified if the reason a person cannot gain entry is because they are unable to complete the requisite forms, and no alternative way of completing such forms is offered by the State.

Issues may also arise where the residence rights or nationality of the person seeking entry is disputed.[350] It is therefore important that there continues to be an effective way to assert the rights under A3P4 throughout the pandemic when States have broader powers to refuse entry to non-nationals. Any refusal of entry to a person who believes they should be admitted on the grounds of their residence rights must be challengeable.

[349] See *Kiyutin v. Russia*, judgment of 10 March 2011, no. 2700/10 (included as a summary in this publication) where the Court accepted that travel restrictions can be instrumental for the protection of public health, but emphasised this only applied to highly contagious diseases with short incubation periods such as cholera, yellow fever, SARS and "bird flu" (H5N1), as individuals may, by their very presence in a country through casual contact or airborne particles, transmit such diseases.

[350] *Oudrhiri v. France*, admissibility decision of 31 March 1993, no. 19554/92 (included as a summary in this publication)

6. Article 6 – Right to a fair hearing

The main aim of Article 6 is to ensure the overall fairness of both civil and criminal proceedings. Article 6 § 1 provides:

> *"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

The protections in Article 6 § 1, including the requirement of overall fairness, effective participation in proceedings, and the entitlement to a public hearing within a reasonable time (discussed in subsections (a) – (c) below) apply in the context of both civil and criminal proceedings. The requirements under Article 6 § 3, discussed in subsection (d) below apply only in the context of criminal proceedings.

Throughout the Covid-19 pandemic, States introduced a range of measures adapting the operation of their judiciaries, many of which restricted physical access to the courts.[351] Some States introduced new categories of priority cases, and ensured that some in person hearings continued to take place where deemed urgent.[352] Otherwise, in courts across Europe (including the two European Regional courts, the CJEU and the ECHR)[353] hearings were postponed, heard

[351] For a list of measures adopted across Europe see https://www.coe.int/en/web/cepej/compilation-comments "Management of the judiciary - compilation of comments and comments by country", Council of Europe interactive map.

[352] https://experts-institute.eu/europe-de-la-justice/cepej/la-cepej-la-covid-19-rend-possible-limpossible/ "CEPEJ: COVID-19 rend possible l'impossible", Alain Nuée, 17 July 2020

[353] In respect of the ECHR see: "*The functioning of the Court during the period of confinement*", Press Release ECHR 111 (2020) 15 April 2020. In respect of the CJEU see: Press Release no. 46/2020 of 3 April 2020.

remotely via telephone or video conferencing technology, or decided on the papers, on the basis of written submissions, without an oral hearing.[354] In certain States, procedural rules and deadlines were relaxed or temporarily suspended, for example permitting one judge to hear a case, instead of a panel of judges. Such measures also led, in some cases, to the prolongation of pre-trial detention.[355]

The unprecedented situation of the Covid-19 pandemic raised difficult questions for courts across Europe.[356] Generally, States that had already introduced videoconferencing and other technology into judicial proceedings, or those that already relied more heavily on written proceedings, adapted more quickly and effectively to the challenges posed by the pandemic.[357]

Despite the obstacles posed, States continued to have a responsibility throughout the pandemic to secure compliance with the requirements of Article 6.[358] This required careful consideration of the individual circumstances of each case to determine the most effective way to proceed whilst physical access to courts was limited.[359] A fair balance must always be struck between the various

[354] https://experts-institute.eu/europe-de-la-justice/cepej/la-cepej-la-covid-19-rend-possible-limpossible/ "*CEPEJ: COVID-19 rend possible l'impossible*", Alain Nuée, 17 July 2020

[355] See: https://www.dalloz-actualite.fr/flash/covid-19-adaptation-des-regles-applicables-en-matiere-penale "Covid-19 : adaptation des règles applicables en matière pénale", Dorothée Goetz, 24 November 2020; https://www.vie-publique.fr/en-bref/274047-adaptation-des-procedures-penales-face-au-covid-19 "Justice : quelles adaptations des règles de procédures pénales?" 6 April 2020.

[356] For example, in the case *XX v OO* (C-220/20), an Italian court made a request for a preliminary ruling to the CJEU concerning state of emergency measures including the suspension of administrative, civil and criminal court activities including hearings and various deadlines, with exceptions for urgent cases. The referring court asked whether certain provisions of the Treaties and the Charter enshrining EU values and fundamental rights preclude the state of emergency measures, having in mind in particular (but not only) access to justice rights concerning: the undermining of judicial independence, impact on judicial functioning, infringement of the principle of due process and equality before the law, and overall 'paralysis of civil and criminal justice'. The CJEU declared the request manifestly inadmissible.

[357] https://experts-institute.eu/europe-de-la-justice/cepej/la-cepej-la-covid-19-rend-possible-limpossible/ "*CEPEJ: COVID-19 rend possible l'impossible*", Alain Nuée, 17 July 2020

[358] https://rm.coe.int/declaration-en/16809ea1e2 "*CEPEJ Declaration: Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic*" European Commission for the Efficiency of Justice (CEPEJ), CEPEJ (2020)8rev, 10 June 2020.

[359] See Statement of the President of the Consultative Council of European Judges (CCJE), "*The role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges*", CCJE(2020)2, Strasbourg, 24 June 2020.

aspects of Article 6,[360] for example the requirement to hold a hearing within a reasonable time may need to be balanced against the appropriateness of holding a remote hearing which can take place sooner, but which can impact the fairness of proceedings differently, depending on the nature of the case and the parties involved.[361]

In many cases, amendments to the procedural rules governing judicial proceedings were introduced as temporary measures, but continued to be extended as the pandemic continued to impact proceedings longer than many envisaged when emergency measures were first introduced.[362] Additionally, some of the new measures adopted in response to the Covid-19 pandemic have continued to be utilised after social distancing and lockdown restrictions were eased, to help alleviate the considerable backlog of cases caused by the pandemic. Such measures also have the potential to improve access to justice where limited access to transport and other logistical obstacles already impeded access to courts, and continue to do so.[363] For example, CEPEJ recommends that, following the pandemic, numerous aspects of traditional court functioning should be reconsidered, including relations with the media, level of use of new technologies and increased recourse to alternative dispute resolution, in particular to mediation.[364]

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[360] *Boddaert v. Belgium*, judgment of 12 October 1992, no. 12919/87, § 39

[361] See "*Visioconférences imposées en matière pénale durant l'état d'urgence sanitaire : atteinte aux droits de la défense*", Dorothée Goetzle, 16 février 2021, the French Conseil d'Etat on 12 February 2021 found that the provisions of the ordinance of November 18, 2020, authorizing the use of videoconferencing, without the agreement of the parties, seriously and manifestly undermined the rights of the defense. See also the order of November 25, 2020, of the Regional Court of Šiauliai, Lithuania, which ruled, taking into account the importance of the fundamental right of access to justice and the particular context of the case, that it was not acceptable that the formalities for filing an application before the court of first instance were not respected, despite arguments that this failure was due to the restrictions imposed as a result of the pandemic (Šiaulių apygardos teismas, Civilinė byla, order of 25.11.2020, Nr. e2S-802-368/2020).

[362] See: https://www.dalloz-actualite.fr/flash/covid-19-adaptation-des-regles-applicables-en-matiere-penale, Dorothée Goetz, 24 November 2020, which discusses, for example, the government orders in France modifying court procedures, which were initially introduced until the end of 2020, but subsequently extended until 31 December 2021.

[363] See https://peacekeeping.un.org/sites/default/files/rch_final.pdf "*Remote Court Hearings and Judicial Processes in Response to COVID-19 in Mission and other Fragile Settings*" UN Justice and Corrections Service paper, 29 April 2020

[364] https://rm.coe.int/declaration-en/16809ea1e2 "*CEPEJ Declaration: Lessons learnt and challenges faced by the judiciary during and after the COVID-19 pandemic*" European Commission for the Efficiency of Justice (CEPEJ), CEPEJ (2020)8rev, 10 June 2020.

As such measures appear to become more permanent fixtures in the administration of justice, it is yet more important to ensure that any new systems or measures adopted in the context of the pandemic are sufficient to protect the right to a fair trial.

a. Overall fairness and effective participation in proceedings

Whilst remote hearings had already been introduced in numerous jurisdictions across Europe, the Covid-19 pandemic rapidly accelerated their use to a scale never seen before, helping to provide access to justice throughout the pandemic.[365]

In the context of remote-hearings, the requirements of Article 6 still apply. This includes the right of an accused or a litigant to participate effectively in a hearing or trial,[366] which means not only a right to be present, but also to hear and follow the proceedings. The requirements on hearings under Article 6 are more stringent than those under Article 5. Thus, it might have been acceptable under Article 5 for an applicant to be represented by their lawyer, rather than participating in a hearing themselves, during the pandemic. However, such a situation is unlikely to be compliant with the more stringent protections under Article 6 in respect of civil and criminal proceedings.[367]

Poor acoustics and hearing difficulties in the courtroom may give rise to an issue under Article 6[368] and this applies in the context of remote hearings too. The Court has accepted that questioning via video-link can ensure effective participation in proceedings,[369] and has found that the use of videoconferencing is neither a problem, nor an advantage under Article 6, as long as its use serves the aim of securing the overall fairness of proceedings.[370] The quality of the technology used

[365] https://doi.org/10.36745/ijca.379 "*Video-Hearings in Europe Before, During and After the COVID-19 Pandemic*", Anne Sanders, 6 May 2021, International Journal for Court Administration

[366] *Murtazaliyeva v. Russia*, Grand Chamber judgment of 18 December 2018, 36658/05, § 91

[367] *Bah v. the Netherlands*, decision of 22 June 2021, no. 35751/20, §44, where it was found that it was not incompatible with Article 5 § 4 to assess the applicant's detention order without securing his attendance at the hearing, but where the Court stressed that it should be borne in mind that Article 5 § 4 does not impose the same stringent requirements as Article 6 under its civil or criminal head.

[368] *Stanford v. the United Kingdom*, judgment of 23 February 1994, no.16757/90, § 29

[369] *Bivolaru v. Romania*, judgment of 2 October 2018, no. 66580/12

[370] *Sakhnovski v. Russia*, Grand Chamber judgment of 2 November 2010, no. 21272/03 (included as a summary in this publication); see also the different positions of the French Court of Cassation and the French Constitutional

is therefore a key factor in ensuring the right to a fair trial is secured as participants via video link must be able to follow proceedings and be heard without technical impediments.[371] Effective and confidential communication with a lawyer must also be provided for.[372]

Decisions regarding whether to use technology to hold a remote hearing should be made on a case-by case basis, taking into account all possible implications that might stem from the use of technology, including the technical quality and the limitations of the technologies that might be used.[373] Other factors which should be taken into account include the vulnerability of any witnesses, whether they have learning difficulties or disabilities which would render engagement via technology more difficult, whether they have access to a private space in which to recount private and sometimes traumatic information, and whether their credibility is in issue.

Council concerning the ordonnance adapting criminal procedure rules to deal with the Covid-19 pandemic, including the possibility of using a means of audio-visual telecommunication without obtaining the agreement of the parties. The Court of Cassation, in its judgment of 6.10.2020, no. 20-84.171, considered that the use of audio-visual telecommunication, in the context of the extension of pre-trial detention, was not contrary to Articles 5 and 6 ECHR when judges were required in this context to conduct proceedings in a manner which ensured respect for the rights of the defense and guaranteed the adversarial nature of proceedings. However, by a decision of January 15, 2021, no. 2020-872 QPC, the Constitutional Council ruled this provision unconstitutional. Considering the importance of the guarantee that can attach to the physical presentation of a person before the criminal court, and taking account of the fact that the use of audio-visual telecommunications was not subject to any legal conditions or exceptions, or the requirement of the parties' consent, it concluded that the provision infringed the rights of the defence in a manner that could not be justified by the context of the health emergency.

[371] See https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf "*The Impact of COVID-19 measures on the civil justice system*", by Dr N.Byrom, S.Beardon and Dr A. Kendrick, Civil Justice Council and Legal Education Foundation report, May 2020. The report found an under-investment in facilities, technology and staff at the County Court level, and the lack of availability of bespoke platforms for video hearings, which caused problems for court users. Almost half of all hearings in their sample experienced technical difficulties, with little or no technical support to deal with the issues.

[372] *Yaroslav Belousov v. Russia*, judgment of 4 October 2016, nos. 2653/13 and 60980/14; *Sakhnovskiy v. Russia*, Grand Chamber judgment of 2 November 2010, no. 21272/03, § 98 (included as a summary in this publication).

[373] *Yevdokimov and Others v. Russia*, judgment of 16 February 2016, nos. 27236/05, 44223/05, 53304/07, 40232/11, 60052/11,76438/11, 14919/12, 19929/12, 42389/12, 57043/12 and 67481/12, where the Court found a violation of Article 6 because the domestic courts did not appear to have conducted an adequate substantive analysis, with published reasons, on whether physical presence was necessary to the fairness of proceedings, and what other options and compensating measures existed if physical presence was not required.

Reports demonstrate that defendants and witnesses may find proceedings more disorientating, confusing and stressful without a person physically present acting on their behalf, and both counsel and witnesses have reported difficulties ascertaining the mood of judges and juries without visibility of the non-verbal cues they would normally respond and adjust to in the court room. Nuances and misunderstandings may be more easily undetected in a remote hearing, and judges have reported that defendants can appear remote and disengaged on screen.[374] Technical problems, echoes and interruptions can exacerbate this problem. Where credibility of a witness is at stake, in person-hearings do therefore remain preferable.[375]

The impact of delaying a hearing is a factor which may weigh in favour of holding a remote hearing. For example, if a delay means a defendant will be subject to a longer period of pre-trial detention without a hearing and it is judged unsafe for a hearing to be held in-person. The nature and complexity of the case is also relevant, videoconferencing may be more suited to short, simple cases, rather than more complex cases, where multiple parties and witnesses are involved, and questions of fact are in dispute.

Safeguards to help ensure the fairness of remote hearings

Where there are strong justifications to mandate the use of remote justice procedures, remote hearings should only take place if there are adequate safeguards in place to address the various potential threats to the right to a fair trial. Safeguards may include the following measures:

i) Where the use of remote hearing technology is dependent on the consent of the parties, ensure that consent is freely given and fully informed, taking account of the vulnerability of the parties, and whether they are in a situation where they may be forced or manipulated into consenting.[376]

[374] See http://spccweb.thco.co.uk/media/4807/university-of-surrey-video-enabled-justice-final-report-ver-11.pdf "Video Enabled Justice Evaluation", by Prof. N. Fielding, Prof. S.Braun and Dr G.Hieke, Sussex Police & Crime Commissioner and University of Surrey, March 2020, which found defendants were more likely to be jailed in remote hearings.

[375] See https://peacekeeping.un.org/sites/default/files/rch_final.pdf "Remote Court Hearings and Judicial Processes in Response to COVID-19 in Mission and other Fragile Settings" UN Justice and Corrections Service paper, 29 April 2020

[376] https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf

ii) Ensuring video links replicate a courtroom as far as technically possible, to try to ensure each participant has a full view of all others involved.
iii) Making technical support available to any party experiencing technical difficulties.
iv) Ensuring the defendant, litigants and/or witnesses have the option to confer with or provide instructions to counsel confidentially during proceedings.
v) Protecting information security. In some jurisdictions Skype and WhatsApp have been used to hold hearings, but the level of security of these communication platforms is unclear.[377]
vi) Enrolling judges in training courses to provide them with the technical expertise to manage a remote hearing, including their own participation and that of others.[378]
vii) Holding moot court sessions before a full hearing to ease the transition to remote hearings and ensure any technical difficulties are ironed out in advance.
viii) Updating existing procedural rules and issuing new guidance on how to decide whether a remote hearing is appropriate and on any new timelines or procedures in place.
ix) Informing defendant, litigants and/or witnesses in advance on what to expect, how the hearing will unfold, the technical requirements on them, and how they can access assistance, e.g. interpretation or technical.

In the same way that the integrity of the court system, including its competences, independence and impartiality, the right to access to a court and to an effective remedy must be safeguarded for the protection of human rights in emergency situations, the integrity of the prosecution service and its organisation should also be protected, applying the same rationale, as the only way to guarantee the functioning of the justice system during an emergency situation. In emergency situations, and in particular during a pandemic,

"*Videoconferencing, Courts and Covid-19, Reccommendations based on International Standards*", International Commission of Jurists, November 2020.

[377] See https://www.coe.int/en/web/cepej/compilation-comments "*Management of the judiciary - compilation of comments and comments by country*", Council of Europe interactive map

[378] See https://rm.coe.int/declaration-en/16809ea1e2 "*CEPEJ Declaration: Lessons learnt and challenges faced by the judiciary after the COVID-19 pandemic*" European Commission for the Efficiency of Justice (CEPEJ), CEPEJ (2020)8rev, 10 June 2020

prosecution services and prosecutors must apply the law without falling below the expected standards, with strict respect for human rights and fundamental freedoms. The functioning of prosecution services, must, like that of courts, adapt to the circumstances imposed by an emergency situation to ensure pre-hearing preparation and investigation continues to take place. This includes the adoption of new technologies, such as online procedures to communicate cases, facilitating the remote participation of victims, experts and witnesses in pre-trial proceedings via videoconferencing, legal recognition of electronic evidence or evidence presented by electronic means, establishment of electronic case files and evidence management systems.[379]

b. Public hearing

The public character of proceedings is an important part of ensuring fairness. The administration of justice should be visible so that it is open to public scrutiny. A trial complies with the requirement of publicity if the public can obtain information about its date and place, and if this place is easily accessible.[380] This enables members of the public, and importantly journalists, to attend a trial, report to a wider audience on what takes place, and perhaps present a different perspective on the case to that which might be released by the State.[381] Webcasting court sessions can be used to reach a wider audience and encourage a broader interest in the aspects of public life touched upon by courts. In the context of the pandemic, and in any emergency situation, webcasting can be viewed as even more justified, not only for civic engagement, but in order to expressly demonstrate that justice is being performed openly and in public.[382]

During the pandemic, physical access to some courts was limited, preventing or making it difficult for journalists to attend courts.[383] Where hearings have

[379] CCPE Opinion No. 15 (2020): The role of prosecutors in emergency situations, in particular when facing a pandemic, 19 November 2020

[380] *Riepan v. Austria*, judgment of 14 November 2000, no.35115/97, §§ 27-29

[381] See https://insights.doughtystreet.co.uk/post/102g6r7/open-justice-during-lockdown "*Open Justice During Lockdown*", by C. Gallagher QC, Doughty Street Insights, 7 May 2020

[382] CCPE Opinion No. 15 (2020): The role of prosecutors in emergency situations, in particular when facing a pandemic, 19 November 2020

[383] See the changes in Hungary: https://www.helsinki.hu/wp-content/uploads/HHC_changes_in_Hun_crim_proc_COVID-19_08052020.pdf "*Changes in the Hungarian Criminal Procedure due to COVID-19*", Hungarian Helsinki Committee, 8 May 2020. See also, for example, the decision of the Polish Supreme Administrative Court

taken place remotely, information has not always been sufficient to enable the public or journalists to know when hearings will take place, what a trial will be about, or how to login to watch online. Where journalists have been able to login to watch remote hearings, some have expressed concerns about their connection being interrupted or cut completely. In criminal proceedings in particular there is a high expectation of publicity, although the Court has accepted that on occasion it may be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses.[384] The instances where security concerns justify excluding the public from a trial are rare however.[385] Any security measures should be narrowly tailored and comply with the principle of necessity, after all possible alternatives to ensure the safety and security in the courtroom have been considered.[386]

In the context of the pandemic, whilst there were concerns about the safety of people attending courts physically, there were also concerns about the security of admitting the public to online hearings, due to the potential for disruptions to the hearing and the need to protect confidentiality.[387] Such concerns should be dealt with in a way which maximises public scrutiny of a hearing, whilst ensuring the hearing runs smoothly and confidential information and the privacy of participants is protected. These factors can be managed without a total exclusion of the public from remote hearings, for example by ensuring those managing a hearing have sufficient technical expertise and guidance to mute and/or exclude disruptive participants, so that this measure is applied consistently and only when necessary. Additionally, where live streaming is not possible, recordings of proceedings could be released to the public, in some cases after editing out any private or confidential information.

that the right to a public hearing is not absolute and may be restricted by law in order to protect public health. Given that the aim of the law in question was to protect human life and health against Covid-19, it could be applied by judges to restrict the right to a public hearing (Naczelny Sąd Administracyjny, decision of 30.11.2020, II OPS 6/19)

[384] *B. and P. v. the United Kingdom*, judgment of 24 April 2001, nos. 36337/97 and 35974/97, § 37

[385] *Riepan v. Austria*, judgment of 14 November 2000, no.35115/97, § 34

[386] *Krestovskiy v. Russia*, judgment of 28 October 2010, no. 14040/03, § 29

[387] "*CCBE Guidance on the use of remote working tools by lawyers and remote court proceedings*", 27 November 2020, at www.ccbe.eu

c. Within a reasonable time

Whilst emergency measures were introduced to ensure the administration of justice could continue during the pandemic, across many jurisdictions, hearings deemed 'non-urgent' were simply postponed. The delays in proceedings brought about as a result of the pandemic only added to the existing backlog of cases in States across Europe, posing a threat to the element of Article 6 which requires hearings to take place 'within a reasonable time'. The reasonableness of the length of proceedings is to be determined in the light of an overall assessment of the circumstances of the case[388] for example, what is at stake for the parties, if a defendant is held in pre-trial detention,[389] the complexity of the case, the individual's conduct and the conduct of the authorities.[390]

States will not be held liable for delays in proceedings caused by a temporary backlog of business where they are taking remedial action, with the requisite promptness, to deal with the exceptional situation of a backlog.[391] However, the Court rarely affords a lot of weight to arguments that delays in proceedings are caused by a heavy workload.[392] A large number of cases have not been processed during the pandemic and the backlog from adjournments made during the pandemic is likely to impact access to justice for a number of years.[393] A suspension of proceedings for a period of three months due to the impact of emergency measures adopted during the pandemic does not amount to an unreasonable delay, so long as proceedings are actively pursued immediately before and after a short, temporary suspension made necessary by the emergency situation.[394]

[388] *Boddaert v. Belgium*, judgment of 12 October 1992, no. 12919/87, § 36

[389] *Abdoella v. the Netherlands*, judgment of 25 November 1992, no. 12728/87, § 24; *Starokadomskiy v. Russia (no. 2)*, judgment of 13 March 2014, no. 27455/06, §§ 70-71; some national courts have also suggested that the impact of the Covid-19 pandemic situation should be taken into account in sentencing policy, recognising that the impact of a period in prison during the pandemic is likely to be more severe, for example, because those detained in prison are confined to their cells for longer periods and are unable to receive family visits (see Manning, R. v (Rev 1) [2020] EWCA Crim 592 (30 April 2020)).

[390] *Fenech v. Malta*, decision of 23 March 2021, no. 19090/20, § 111 (included as a summary in this publication).

[391] *Milasi v. Italy*, judgment of 25 June 1987, no. 10527/83 § 18; *Baggetta v. Italy*, judgment of 25 June 1987 § 23, no. 10256/83

[392] *Eckle v. Germany*, judgment of 15 July 1982, no. 8130/78, § 92

[393] See https://www.fairtrials.org/news/short-update-trials-uk-could-face-delays-five-years-because-pandemic; "*Short Update: Trials in the UK could face delays up to five years because of the pandemic*", by Fair Trials Admin, 22 June 2020

[394] *Fenech v. Malta*, decision of 23 March 2021, no. 19090/20, §113 (included as a summary in this publication) where proceedings had lasted sixteen months. The Court found that, given the complexity of the case, this time

To ensure compliance with this aspect of fairness under Article 6, States must promptly take all measures they can to address the backlog which has resulted from the pandemic.[395] This may include continuing the remote hearings process, holding hearings during the summer recess, and increasing the budget and resources for the judicial system.

d. The rights of the defence to prompt, practical and effective legal assistance

Article 6 § 3 sets out specific guarantees to help ensure the overall fairness of criminal proceedings, it provides that everyone charged with a criminal offence has the following minimum rights:

> *"(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
>
> *(b) to have adequate time and facilities for the preparation of his defence;*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

period could not be considered unreasonable, in particular as the applicant had not referred to any failings, delays or omissions on behalf of the authorities, apart from when the proceedings had been suspended due to the emergency measures. Therefore, the authorities could not be reproached for their conduct. The fact that no hearings had taken place during his committal proceedings for a period of around three months – during which court work had been stalled due to a worldwide pandemic – did not alter that conclusion. Nor could it be said that as a result of the emergency measures, the essence of the applicant's right of access to a court had been impaired.

[395] See https://www.fairtrials.org/news/short-update-covid-19-court-delays-may-lead-more-children-and-young-people-being-convicted "*Short Update: COVID-19 court delays may lead to more children and young people being convicted as adults in England and Wales*", by Fair Trials Admin, 24 June 2020.

The rights discussed below do not apply in the context of civil proceedings.

The right to concrete and effective legal assistance

Under Articles 6 § 3 (b) and 6 § 3 (c) counsel must be able to provide concrete and effective assistance[396] to the accused throughout proceedings, enabling the accused to obtain the whole range of services specifically associated with legal assistance, including preparation for questioning, support of an accused in distress and checking of the conditions of detention.

Those accused of committing a crime have a right to prompt access to a lawyer from the moment they are first held and questioned in police custody. The Court has recognised that effective legal consultation prior to and during police questioning is an essential protection under Article 6, as police questioning can represent a critical stage in criminal proceedings, where statements obtained during questioning are later used in court. The right to be assisted by a lawyer includes not only the right to have a lawyer present during questioning, but also that the lawyer is allowed to actively assist a suspect during questioning by the police and to intervene to ensure respect for the suspect's rights.

The right to private communication with a lawyer

One of the basic, fundamental elements of the right to a fair trial is the right to private communication with a lawyer, without the risk of being overheard by a third party.[397] States are obliged to provide adequate facilities to enable confidential, direct and meaningful communication between lawyer and client. The lockdown and social distancing requirements imposed in response to the pandemic have rendered it more difficult to secure the right to practical and effective communication between client and counsel.[398] As visits to places of detention were restricted and hearings took place remotely, many lawyers were

[396] *AT v. Luxembourg*, judgment of 9 April 2015, no. 30460/13

[397] See *Castravet v. Moldova*, judgment of 13 March 2007, no. 23393/05, § 49

[398] See for example the survey conducted by Fair Trials International which found a strong consensus amongst respondents that the quality of legal assistance in England and Wales had suffered significantly due to Covid-19 related restrictions and that remote communication was a poor substitute for in-person legal assistance: https://www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf "*Justice under lockdown: a survey of the criminal justice system in England & Wales between March and May 2020*", Report of Fair Trials International, 25 June 2020.

unable to attend police stations to assist clients in custody before and during police questioning and have been unable to take instructions and witness statements from clients in person. Instead, lawyers and clients are increasingly reliant on telephone calls, video link and other forms of remote communication.[399]

This may undermine the quality and effectiveness of the assistance that lawyers can provide, where such methods of communication render it more difficult to establish a rapport or relationship of trust with the client.[400] Lockdown conditions also impeded access to prompt and/or regular advice where suspects may not have regular access to phones and the length of their calls may be restricted if a limited number of phones are shared between a large number of inmates and/or where they are obliged to pay to make calls. Many prisons may not have the requisite technology to facilitate video calls between client and counsel. Even where they do, the video link or telephone line may not be secure. There are also concerns regarding the privacy of client-lawyer communications, as often both lawyer and client may not have access to a private space to speak on the phone or via video link, without being overheard for example by other inmates or prison staff. [401]

The Court has previously suggested that the provision of a secured phone line could be one method via which a State could fulfil their obligations to take measures to facilitate regular, secure, private and effective communication between client

[399] For example, in the Netherlands lawyers were only allowed to visit clients in detention on urgent matters and were required to file reasoned requests for a visit; in Spain legal assistance through video conference was encouraged, but not implemented due to lack of equipment; in France, the Paris bar council stopped appointing legal aid lawyers due to lack of personal protective equipment, which meant that defendants may not have been represented in certain cases: https://www.fairtrials.org/sites/default/files/2_FT_COVID-19_Access%20to%20Lawyer_Template%20arguments_2_Effective%20Access%20to%20a%20Lawyer.pdf "*Safeguarding the right to a fair trial during the coronavirus pandemic: access to a lawyer*", Report of Fair Trials, 3 April 2020.

[400] See https://www.fairtrials.org/sites/default/files/2_FT_COVID-19_Access%20to%20Lawyer_Template%20arguments_2_Effective%20Access%20to%20a%20Lawyer.pdf "*Safeguarding the right to a fair trial during the coronavirus pandemic: access to a lawyer*" Report of Fair Trials, 3 April 2020; https://www.fairtrials.org/sites/default/files/Justice%20Under%20Lockdown%20survey%20-%20Fair%20Trials.pdf "*Justice under lockdown: a survey of the criminal justice system in England & Wales between March and May 2020*", Report of Fair Trials International, 25 June 2020

[401] See *Rybacki v. Poland*, judgment of 13 January 2009, no. 52479/99, § 58 where the Court found a violation of Article 6 because prosecutors and bailiffs were present in the same room as a lawyer and their client when they were speaking.

and lawyer where in-person visits are not possible.[402] Given the extent of the restrictions on in-person contact in the context of Covid-19, more extensive measures may need to be introduced to ensure the requirements of Article 6 § 3 are met. This could include increasing the number of phones available for inmates to use, installing video link technology in places of detention,[403] making calls free or providing a greater allowance of free calls, reducing or removing limits on the length of calls to counsel and creating private rooms or spaces in which clients can communicate without being overheard. When it becomes appropriate for in-person visits to take place, sufficient protective equipment should be provided to ensure they can be carried out safely.[404]

[402] *Marcello Viola v. Italy*, judgment of 5 October 2006, no. 45106/04, §§ 41 and 75

[403] This approach was successful, for instance, in Northern Ireland, where a lawyer sought judicial review of the police authority's decision to refuse to put in place "some form of digital mechanism such as Skype or Zoom" for an interview to enable the effective participation of the person's lawyer: https://www.irishlegal.com/article/solicitor-acts-remotely-for-client-in-police-interview-in-northern-ireland-first "*Solicitor acts remotely for client in police interview in Norţthern Ireland first*", by C. Beaton, Irish Legal News, 16 April 2020.

[404] For instance, the Bucharest Bar Association distributed protective equipment (gloves and masks) to lawyers. See https://www.legalmarketing.ro/baroul-bucuresti-anunt-avocati-masti-si-manusi-de-protectie/ "BAROUL BUCUREŞTI Anunț avocați – măști și mănuși de protecție", Legal Marketing, 25 March 2020

7. Article 9 – Right to freedom of thought, conscience and religion

Measures taken to combat the Covid-19 pandemic interfered with the right to freedom of religion in two key respects. Firstly, measures, including lockdowns and restrictions on public gatherings, also included the suspension of religious gatherings, thereby impacting the right to manifest one's religion or belief in public, or in community with others.[405] Secondly, whilst States might have an obligation to provide treatment and protection against Covid-19, individuals might also have a right to refuse medical treatment on the basis of their religious beliefs.

Article 9 ECHR provides:

> *1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
>
> *2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

[405] At the time of writing, the cases of *Spînu v. Romania*, communicated on 1 October 2020, no. 29443/20 and *Association d'obédience ecclésiastique orthodoxe v. Greece*, communicated on 25 February 2021, no. 52104/20, are pending before the Court. The first concerns the Romanian authorities' refusal to allow the applicant, a detained member of the Seventh-day Adventist Church, to go to a church in Bucharest to celebrate the Sabbath. The second concerns the ban on collective worship between 16 March and 16 May 2020, including over the Easter period.

a. Scope of Article 9

The right to manifest one's religion or belief

Article 9 protects the right to manifest one's religion, not only alone and in private, but also in community with others, in public, alongside those whose faith one shares. This means that Article 9 protects the right of believers to meet peacefully in order to worship in the manner prescribed by their religion. Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards the right to freedom of association. Article 9 protects, therefore, the rights of believers to associate freely, without arbitrary State intervention.[406] Even if an individual is able to manifest their religion alone, or in the company of others, restrictions on their freedom of movement constitute an interference with their right to observe their religious beliefs, if such restrictions prevent them from accessing places of worship or attending religious ceremonies.[407]

However, Article 9 does not bestow a right at large for individuals to gather to manifest their religious beliefs wherever they wish.[408] Restrictions on where a person can manifest their religion or belief are less likely to constitute an interference with, or a violation of, Article 9 where it is possible for a person to worship or practice their beliefs in a similar manner elsewhere.[409]

Freedom of religion and medical treatment

The freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, is vital to the principles of self-determination and the right to personal autonomy in the sphere of religious beliefs. A competent adult patient is free to decide, for instance, whether or not to undergo surgery or treatment, or whether or not to have a blood transfusion, where refusal of such treatment accords with their religious beliefs. For this freedom to be meaningful, patients must have the right to make choices that accord with their own views, values and religion regardless of how irrational, unwise or imprudent such choices may appear to others.[410]

[406] *Jehovah's Witnesses of Moscow and Others v. Russia*, judgment of 10 June 2010, no.302/02 § 99

[407] *Cyprus v. Turkey*, Grand Chamber judgment of 10 May 2001, no. 25781/94

[408] *Pavlides and Georgakis v. Turkey*, decision of 2 July 2013, nos. 9130/09 and 9143/09, § 29

[409] *Josephides v. Turkey*, decision of 24 August 1999, no. 21887/93

[410] *Jehovah's Witnesses of Moscow and Others v. Russia*, judgment of 10 June 2010, no.302/02 § 134

However, refusal of treatment, such as a blood transfusion, which impacts only the health of the individual, is distinguishable from refusal of vaccination during an epidemic, which can also impact the health of others. The obligation on States to abstain from interfering with individual freedom of choice in the sphere of health care applies where there is no indication of the need to protect third parties.[411] The Court has not formally determined whether or not the guarantees of Article 9 apply to a refusal to be vaccinated or a refusal to have one's children vaccinated on the basis of a critical stance towards vaccination. The question has briefly been addressed in older case law, where it was found that, an obligation to be vaccinated which applied to everyone, whatever their religion, did not interfere with Article 9.[412]

The Court has also found that a critical opinion on vaccination does not necessarily constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance, to fall within the ambit of Article 9. To argue that compulsory vaccination interferes with Article 9, it would be necessary to substantiate the argument with clear, consistent and specific reasons regarding how a person's religious or philosophical beliefs are impacted by or opposed to vaccination.[413]

[411] *Jehovah's Witnesses of Moscow and Others v. Russia*, judgment of 10 June 2010, no.302/02 § 136, where the Court quoted from judgments of the Supreme Court of Canada and the Court of Appeals of New York, to find that the State must abstain from interfering with the individual freedom of choice in the sphere of health care in situations where there is no need to protect third parties, citing specifically the example of mandatory vaccination during an epidemic as a case where they may be a need for State interference.

[412] *Boffa and Others v. San Marino*, Commission decision of 15 January 1998, no. 26536/95

[413] Contrast *Vavřička and Others v. the Czech Republic*, judgment of 8 April 2021, nos. 47621/13 and 5 others, §272 (included as a summary in this publication) with *Jehovah's Witnesses of Moscow and Others v. Russia*, judgment of 10 June 2010, no.302/02. In the former case, the applicant's critical views of vaccination were not found to engage Article 9, because they were not found to be consistent or credible, because he had stated that his objection to vaccination was primarily health-related; philosophical or religious aspects were secondary and because he had failed to advance any concrete argument concerning his beliefs and the intensity of the interference with them caused by vaccination. In the latter case, Article 9 was engaged where it was found that it was generally known that Jehovah's Witnesses believe that the Bible prohibits ingesting blood, which is sacred to God, and that this prohibition extends to transfusion of any blood or blood components that are not the patient's own. It was also relevant that the religious prohibition permits of no exceptions and is applicable even in cases where a blood transfusion is deemed to be necessary in the best clinical judgment.

Victim Status

An individual can claim to be a "victim" of an interference with Article 9, within the meaning of Article 34 ECHR, if they are required to either modify their conduct or risk being prosecuted if they do not modify their conduct, or if they are a member of a category of people who risk being directly affected by legislation affecting members of their religion. Where emergency Covid-19 legislation banned religious gatherings, an individual could, therefore, claim to be a victim of an interference with their Article 9 rights, solely because they are confronted with a choice between complying with the ban (and refraining from partaking in religious practices or ceremonies), or refusing to comply and facing the risk of prosecution / punishment.[414]

b. Permitted interferences with the right to freedom of thought, conscience and religion

Legitimate Aims

Under Article 9 § 2, the legitimate aims which can justify an interference with an individual's manifestation of their religion or beliefs include public safety, the protection of public order, health and morals, and the protection of the rights and freedoms of others. This enumeration of legitimate aims is strictly exhaustive and the definition of the aims is necessarily restrictive to reflect the fundamental importance of religious pluralism as "one of the foundations of a democratic society".[415] Restrictions placed on freedom to manifest one's religion to prevent the spread of Covid-19 are, therefore, likely to constitute a 'legitimate' aim in pursuit of which States are permitted to interfere with freedom of religion, if such an interference is deemed necessary and proportionate.

Proportionality

Any interference with the rights protected under Article 9 must be justified, necessary and proportionate, and must correspond to a "pressing social need".

[414] See *S.A.S. v. France*, Grand Chamber judgment of 1 July 2014, no.43835/11, where the Court acknowledged that a Muslim woman wishing to wear the full-face veil in public for religious reasons could claim to be a "victim" solely because such conduct was punishable by law, by means of a fine accompanied or replaced by a compulsory citizenship course.

[415] *Nolan and K v. Russia*, judgment of 12 February 2009, no. 2512/04, § 61

There must be no other means of achieving the same end that would interfere less seriously with the fundamental rights protected under Article 9, with the burden on the authorities to show that no other measures are available to achieve the legitimate aim pursued.[416]

The historical background and special features of the religion in question, including dogma, observance and organisation, are relevant to an assessment of the conformity of a domestic measure with Article 9 § 2 of the Convention.[417] When assessing the proportionality of restrictions on religious gatherings during the pandemic it may, therefore, be relevant to take account of the importance of collective worship, ceremonies or rituals to the religion in question, or to take account of whether restrictions were in place at the time of particularly important events in the relevant religious calendar such as Christmas or Easter.[418] Similarly, it would be relevant to take account of any specific teachings or texts which reference vaccination or reference the use or ingestion of the components of Covid-19 vaccines, when assessing if vaccination policies interfere with Article 9.[419] Under certain circumstances, Article 9 might also be violated when States fail to treat differently persons whose situations are significantly different.[420] This might include, for example, a failure to provide an exemption to a general ban on gatherings, where their religious teachings or beliefs place members of a religion in a significantly different position to others, because of the importance of collective worship or ceremonies to that religion.[421] Where States imposed a complete ban on collective worship or religious gatherings during the pandemic, they would

[416] *Biblical Centre of the Chuvash Republic v. Russia*, judgment of 12 Jne 2014, no. 33202/08, § 58

[417] *Cha'are Shalom Ve Tsedek v. France*, Grand Chamber judgment of 27 June 2000, no. 27417/95, §§ 13-19

[418] At the time of writing, the case of *Association d'obédience ecclésiastique orthodoxe v. Greece*, communicated on 25 February 2021, no. 52104/20, is pending before the Court. The case concerns the ban on collective worship between 16 March and 16 May 2020, including over the Easter period, considered to be one of the most important holidays in the Greek Orthodox calendar.

[419] *Fränklin-Beentjes and CEFLU-Luz da Floresta v. the Netherlands*, decision of 6 May 2014, no.28167/07, where the Court took account of the content of the rites of the applicant association when determining both whether there was an arguable interference with and breach of Article 9.

[420] *Thlimmenos v. Greece*, Grand Chamber judgment of 6 April 2000, § 44

[421] For example, the Belgian Council of State found, in its judgment of 8 December 2020, no. 249.177, that the Belgian government's general ban on collective worship, imposed in October 2020 to limit the spread of Covid-19, was disproportionate, insofar as it did not provide for the collective exercise of worship to take place at least in certain cases, exceptionally and under certain conditions, if necessary, following advance request and authorisation with indication of the place and time.

therefore, need to show that there were no other practical and effective means of protecting health and preventing the spread of Covid-19 during the pandemic.[422] For example, whether socially distanced ceremonies or services could have safely taken place within places of worship which are large enough to accommodate attendees in a sufficiently distanced manner.[423]

[422] See for example, *Chappell v. the United Kingdom*, Commission decision of 14 July 1987, no. 12587/86, which concerned the United Kingdom authorities' decision not to allow a group of Druids to celebrate their solstice ceremony at Stonehenge. The Commission considered that the measure had been aimed at protecting public safety and was justified within the meaning or Article 9 § 2, particularly because the authorities had previously expended considerable efforts to satisfy the interests of individuals and organisations interested in Stonehenge and ultimately found that there was no practical alternative but to close the area. See also the decisions of the French Council of State of 18 May 2020, nos. 440361 and 440511, which found that the general and absolute ban on the organisation of religious ceremonies during the pandemic, for an indeterminate period, was not necessary or proportionate.

[423] For example, the French Council of State, on 29 November 2020, ordered the French government to review a rule limiting the number of people allowed to be in churches during religious services to 30, after Catholic organisations challenged the limit, arguing that churches and cathedrals are more spacious than, for example, retail outlets, where the limit imposed was one person per 8 square metres.

8. Article 10 – Right to free expression

The provision of timely and accurate information about risks to public health, and the measures taken by governments to respond to these risks, was an essential part of tackling the Covid-19 pandemic.[424] The pandemic gave rise, however, to what the World Health Organisation described as an "infodemic" of mis- and disinformation, whereby the extent of the inaccurate or misleading information in circulation presented a serious risk to public health and public action.[425] In response to this, numerous States introduced measures to combat the spread of disinformation. Whilst these measures may have served a legitimate aim, they also risked impinging on the essential functions served by the media, journalists and other organisations to ensure government accountability and facilitate the exchange of useful information during a public-health emergency. In some cases, their capacity to carry out these functions was also hindered by a lack of effective access to information and restrictions on their movement and assembly.

The pandemic also elevated the role played by digital platforms and social media companies in disseminating information, meaning the efforts of private companies, as well as State authorities, became increasingly central to the fight against misinformation.[426]

[424] See https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information-in-times-of-crisis "Freedom of expression and information in time of crisis", Statement of the Council of Europe, 21 March 2020

[425] See https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf "Novel Coronavirus (2019-nCov) Situation Report - 13", Report of the WHO, 2 February 2020

[426] The EU Commission's self-regulatory Code of Practice on Disinformation was introduced in October 2018 and its signatories comprise of major online platforms active in the EU as well as major trade associations representing the European advertising sector. Following the publication of the "Joint Communication on Tackling COVID-19 disinformation – Getting the facts right", on 10 June 2020, signatories to the Code of Practice were subject to monthly reporting requirements as part of a Covid-19 monitoring and reporting programme aimed at limiting online disinformation related to Covid-19. On 16 June 2022, the Commission published a new, Strengthened Code of Practice on Disinformation, in part in response to a review of the strengths and weaknesses of the Code in responding to the infodemic caused by the Covid-19 pandemic: https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation

Numerous aspects of the right to freedom of expression protected under Article 10 have therefore been affected by States' responses to the pandemic. Article 10 provides:

> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

a. Scope of Article 10

Press freedom and media diversity

The right to freedom of expression involves the right to impart information and ideas. Whilst Article 10 does not explicitly mention press, media, or journalistic freedom, the Court has repeatedly recognised the interest of a democratic society in ensuring and maintaining a free press and stressed the importance of the media in fostering public debate, providing the public with information of public interest and exposing official incompetence and wrongdoing by acting as a 'public watchdog'.[427] The Court grants heightened protection under Article 10 to press/media expression and has found that Article 10 involves positive obligations on States to protect those exercising journalistic freedoms from attacks or intimidation which prevent them from carrying out their role.[428]

[427] *Lingens v. Austria*, judgment of 8 July 1986, no. 9815/82

[428] *Özgür Gündem v. Turkey*, judgment of 16 March 2000, no. 23144/93

Article 10 also entails an obligation on those carrying out the role of 'public watchdog' to do so responsibly. The Court has inferred into Article 10 the right of the public to have access to accurate and informed media and the press must impart ideas in a manner consistent with its obligations and responsibilities.[429] Media expression will therefore generally only be protected under Article 10 if it is produced by journalists acting in good faith to provide accurate and reliable information in accordance with the ethics of journalism. Otherwise, the purpose of protecting press freedom would be undermined if such freedoms were used to knowingly disseminate misleading information from unreliable sources.

There is also an obligation on States under Article 10 to guarantee diversity of the media, to ensure that the public has access to content which reflects as far as possible, the variety of opinions encountered in the society at which the programmes are aimed.[430] Press freedom should be rooted in the principle of pluralism to ensure that the public have access to a range of information and ideas. A situation in which one group dominates the content of the press or audio-visual media in a country, or where a public broadcaster has a monopoly over the available frequencies in a country, cannot be justified under Article 10 unless it can be demonstrated that there is a pressing need for it.[431]

Access to Information

Article 10 also includes a right of access to information. A right to access information may also arise under Article 8, for example where the information requested concerns a situation which could lead to a breach of Article 8.[432] The section on Article 8 (Right to respect for private and family life) within this publication describes the situations in which a right to access information concerning health may be protected under Article 8. A request for information will be protected under Article 10 where:

[429] *Bladet Tromsø and Stensaas v. Norway*, Grand Chamber judgment of 20 May 1999, no. 21980/93, §§ 59 and 62

[430] *Informationsverein Lentia and others v. Austria*, judgment of 23 November 1993, nos. 13914/88, 15041/89 15717/89, 15779/89 and 17207/90

[431] *Di Stefano v. Italy*, Grand Chamber judgment of 7 June 2012, no. 38433/09

[432] *Guerra and Others v. Italy*, judgment of 19 February 1998, no. 14967/89 (included as a summary in this publication) where the Court found a breach of Article 8 because the Italian State had failed to take steps to provide information about the risks posed by toxic emissions from a chemical factory and how to proceed in the event of a major accident, given that severe environmental pollution could affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely.

i) Disclosure of the information has been imposed by a judicial order; or
ii) Access to the information is instrumental to the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information".[433] For example, where access to information is sought as an essential preparatory step to writing an article or sharing the information requested with others to create a forum for public debate.

To trigger the protection of Article 10 in respect of situation (ii) described above, the information, data or documents to which access is sought must also, generally, meet a public-interest test. This includes, for example, where the information relates to matters of public interest or where disclosure would provide transparency on the manner of conduct of public affairs, thereby facilitating participation in public governance by the public at large.[434]

The protection of the right to information applies equally to journalists and to non-governmental organisations or other groups, so long as the group's activities form an essential element of informed public debate, and they make the request for information for the purpose of exercising scrutiny of public actions or highlighting matters of public interest.[435] Requests for access to official documents in this context should be dealt with promptly and refusals should be subject to a court or other independent review procedure.[436]

b. What constitutes an interference with the right to freedom of expression?

The Court interprets the concept of interference broadly in the context of freedom of expression to cover any activity which has the effect, directly or indirectly, of limiting, impeding or burdening an expressive activity. Examples of restrictions on speech which have been found to constitute an interference with

[433] *Magyar Helsinki Bizottság v. Hungary*, Grand Chamber judgment of 8 November 2016, no. 18030/11 (included as a summary in this publication)

[434] *Magyar Helsinki Bizottság v. Hungary*, Grand Chamber judgment of 8 November 2016, no. 18030/11 §61 (included as a summary in this publication)

[435] *Magyar Helsinki Bizottság v. Hungary*, Grand Chamber judgment of 8 November 2016, no. 18030/11, §166 (included as a summary in this publication)

[436] *Kenedi v. Hungary*, judgment of 26 May 2009, no. 31475/05, § 48

the right include: the imposition of a criminal sanction (a fine or imprisonment)[437] or an order to pay civil damages in response to expression,[438] an injunction or prohibition on publication,[439] a refusal to grant a broadcasting licence,[440] prohibition to exercise the journalistic profession, a disciplinary penalty or dismissal of an employee,[441] orders to reveal journalistic sources and/or sanctioning for not doing so,[442] the announcement by a head of state that a civil servant will not be appointed to a public post following a statement in public by the civil servant,[443] a refusal to allow a protest vessel into territorial waters,[444] and failing to enable a journalist to gain access to Davos during the World Economic Forum.[445]

Even relatively small fines have been considered by the Court to constitute implicit censorship because, although a small fine may not prevent a journalist from speaking out in a particular case, it could discourage them from making criticisms in the future. Interferences with the right to freedom of expression can arise not only from sanctions actually imposed, but also from the fear of sanctions and the Court has found that freedom of expression is greatly influenced by the wider legal climate for journalists and the media and the risk of a chilling effect where sanctions for certain speech exist.[446]

Interferences with the right to free expression caused by the measures introduced in response to the Covid-19 pandemic

There are, therefore, numerous ways in which the measures introduced in response to the Covid-19 pandemic interfered with the right to freedom of

[437] *Lingens v. Austria*, judgment of 8 July 1986, no. 9815/82

[438] *Muller and Others v. Switzerland*, judgment of 24 May 1988, no. 10737/84

[439] *The Sunday Times v. the United Kingdom (No. 2)*, judgment of 26 November 1991, no. 13166/87; *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, no. 13585/88

[440] *Autronic AG v. Switzerland*, judgment of 22 May 1990, no. 12726/87

[441] *Wojtas-Kaleta v. Poland*, judgment of 16 July 2009, no. 20436/02; *Frankowicz v. Poland*, judgment of 16 December 2008, no. 53025/99

[442] *Goodwin v. the United Kingdom*, Grand Chamber judgment of 27 March 1996, no. 17488/90

[443] *Wille v. Liechtenstein*, Grand Chamber judgment of 28 October 1999, no. 28396/95

[444] *Women on Waves v. Portugal*, judgment of 3 February 2009, no. 31276/05 (included as a summary in this publication)

[445] *Gsell v. Switzerland*, judgment of 8 October 2009, no. 12675/05

[446] *Sallusti v. Italy*, judgment of 7 March 2019, no. 22350/13, § 62 (included as a summary in this publication); *Kapsis and Danikas v. Greece*, judgment of 19 January 2017, no. 52137/12, § 40

expression.[447] Measures which required reporting along pre-defined lines, prohibited criticism of government responses to the pandemic, prohibited the publication of 'false' or 'harmful' information,[448] or prevented the publication of information that may cause panic and social unrest, all interfered with the freedom of the press and its capacity to fulfil a public watchdog function.[449]

Governments introduced new powers to censor online material, ranging from removing Covid-19 related information from certain websites, to blocking

[447] For a more detailed overview of some of the restrictions on freedom of expression introduced during the pandemic, see: https://edoc.coe.int/fr/intelligence-artificielle/9284-covid-and-free-speech-the-impact-of-covid-19-and-ensuing-measures-on-freedom-of-expression-in-council-of-europe-member-states.html# "*COVID AND FREE SPEECH - The impact of COVID-19 and ensuing measures on freedom of expression in Council of Europe member states*", Peter Noorlander, Background Paper, Council of Europe Ministerial Conference, Cyprus, 2020.

[448] At the time of writing the case *Avagyan v. Russia*, communicated on 4 November 2020, no. 36911/20 is pending before the Court. The case concerns an applicant who was found guilty of the administrative offence of 'disseminating untrue information' and fined 30,000 Russian roubles (approximately 390 euros on the day of the judgment) for commenting on an Instagram post, alleging that there were no Covid-19 cases in the Krasnodar Region. Prior to the pandemic, in 2019, the Russian Code of Administrative Offences was amended to create a new offence of "deliberately spreading untrue information under the guise of reliable reports which has created a risk of (amongst other things) causing damage to life or health". The applicant argues that it cannot be said that her statement was 'known to be untrue' because the presence of coronavirus infections in the Krasnodar Region had not been officially confirmed or denied. She also argues that the Russian court had shifted the burden of proof because it had not required the police to produce any materials showing that her allegations had been untrue. Thirdly, she argues that her statement had not created a risk to anyone's life or health.

[449] For example, the Government of the Republika Srpska issued a decree which prohibited causing "panic and disorder" by publishing or transmitting false news during a state of emergency. Individuals found in violation of the decree could be fined between 1,000 and 3,000 Bosnian marks (approximately €500-1,500). Organizations faced a fine of between 3,000 and 9,000 marks (€1,500-4,500): https://balkaninsight.com/2020/03/19/bosnias-republika-srpska-imposes-fines-for-coronavirus-fake-news/ "Bosnia's Republika Srpska Imposes Fines for Coronavirus 'Fake News'", D. Kovacevic and B. Luka, Balkan Insight news, 19 March, 2020. The Macedonian Government granted its Ministry of Interior the mandate to undertake "appropriate measures" against people that spread disinformation on social media in relation to Covid-19 and against media outlets that further disseminate that information: https://vlada.mk/node/20464 "Филипче: Двајца нови позитивни пациенти на коронавирус, Владата одржа седница и донесе дополнителни мерки и активности за превенција од ширење на корона вирусот" Statement of the Government of the Republic of Northern Macedonia, 11 March 2020

websites in their entirety, sometimes without any possibility of judicial review.[450] Inaccurate reporting of the Covid-19 death toll and infection rates,[451] and obligations to publish only 'official information' or information which is consistent with official sources also inhibited press pluralism and the right of the public to have access to information and to a range of ideas.[452]

Restrictions on physical access to press conferences, and strict regulations on the scope of questioning permitted at press conferences held using video conferencing technology interfered with the right to freedom of expression by restricting the right to access information.[453] Additionally, authorities took longer

[450] For example in Armenia a number of newspapers and websites had to delete some information, following the adoption of strict rules prohibiting the publication of information of a medical and epidemiological nature about the virus outbreak which was not fully consistent with official sources: https://eurasianet.org/armenia-takes-hard-line-against-media-reporting-on-covid-19 "Armenia takes hard line against media reporting on COVID-19", A. Mejlumyan, Eurasianet news, 23 March 2020.

[451] https://balkaninsight.com/2020/06/22/serbia-under-reported-covid-19-deaths-and-infections-data-shows/ "*Serbia Under-Reported COVID-19 Deaths and Infections, Data Shows*", Natalija Jovanovic, 22 June 2020, which raises concerns about under-reporting as well as delayed responses to freedom of information requests.

[452] For example the Decree centralising the distribution of information on Coronavirus in Serbia, which provided that the Crisis Headquarters led by the Prime Minister was the sole source of information about the pandemic, and that information from unauthorized sources must not be considered accurate or verified. The order also provided for legal consequences for spreading disinformation during the state of emergency. Following the arrest of at least one journalist for her reporting on the pandemic, the Prime Minister announced the decree would be revoked, less than one week after the decree's introduction: http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/zakljucak/2020/48/1/reg "Закључак (Владе о информисању становништва о стању и последицама заразне болести COVID-19 изазване вирусом SARS-CoV-2) : 48/2020-8" Decree by the Government of Serbia, 31 March 2020.

[453] For example the Association of BH Journalists' criticism of what it described as a restrictive system for journalists asking questions to ministers and health bodies: https://www.bljesak.info/vijesti/flash/bh-novinari-upozoravaju-ovakvi-postupci-vlasti-vode-ka-cenzuri/307122 "BH novinari upozoravaju: Ovakvi postupci vlasti vode ka cenzuri" Vijesti, bljesak.info, March 31, 2020; In Serbia there are examples of journalists who were barred from attending the country's daily COVID-19-related press conferences by the government. Media were only able to submit questions via email, rather than video call, with no follow up questions permitted: https://balkaninsight.com/2020/03/16/coronavirus-live-updates/#1927 "Serbian Health Minister Blames 'Corona in Newsrooms' for Press Conference Ban" M. Stojanovic, Balkan Insight news, 11 April, 2020. Other journalists have criticized the lack of access to information from ministers and health officials: https://www.juznevesti.com/Drushtvo/Informacije-o-korona-virusu-ubuduce-samo-od-Kriznog-staba-novinari-ukazuju-na-prikrivenu-cenzuru.sr.html "Informacije o korona virusu ubuduće samo od Kriznog štaba, novinari ukazuju na

to reply to freedom of information requests during the pandemic,[454] journalists were subjected to smear campaigns after filing requests for information on the measures adopted by the government in response to the pandemic and subjected to harassment whilst trying to report on issues with the response.[455] Travel restrictions and restrictions on assembly also prevented journalists from reporting from the 'frontline', for example reporting on protests or demonstrations.[456]

prikrivenu cenzuru" J. Adamović, južne vesti news, 1 April, 2020. A statement from the Independent Association of Journalists of Vojvodina argued that journalists were denied the right to receive information about the spread of the infection and therefore could not do their job in accordance with professional standards; that public databases, did not offer updated data; and that journalists did not receive timely answers to questions of public importance: https://www.gradjanske.org/wp-content/uploads/2020/07/CSO-activities-related-to-the-COVID-19-response-30-June-6-July.pdf "CSO activities related to the COVID-19 response", Report by Civic Initiatives, 20 June to 6 July 2020; See also https://balkaninsight.com/2020/04/08/bosnia-trying-to-censor-information-about-pandemic-journalists-say/ "Bosnia Trying to Censor Information about Pandemic, Journalists Say" D. Kovacevik and B. Luka, Balkan Insight news, 8 April, 2020.

[454] See for example in Serbia where FOI deadlines were suspended during the state of emergency: https://balkaninsight.com/2020/04/06/central-and-eastern-europe-freedom-of-information-rights-postponed/ "Central and Eastern Europe Freedom of Information Rights 'Postponed'" I. Nikolic, M. Barberá, S. Kajosevic and M. Necsutu, Balkan Insight news, 6 April 2020.

[455] In Slovenia, a journalist who filed an information request about measures adopted by the Slovenian Government in response to the pandemic was the target of a smear campaign by the media. On 23 March the Albania Prime Minister sent citizens a voice message advising people to wash their hands against coronavirus and protect themselves from the media and Ora News journalist Elio Laze was threatened aggressively by a private construction company worker for filming work in violation of the country's COVID-19 curfew: https://balkaninsight.com/2020/03/13/albania-premier-urges-citizens-to-protect-themselves-from-the-media/ "Rama takes his War on Media to Albanians' Phones" G. Erebara, Balkan Insight news, 13 March, 2020; https://exit.al/en/2020/03/24/ora-news-journalist-threatened-by-salillari-employee-after-possible-curfew-violation/ "Ora News Journalist Threatened by Salillari Employee After Possible Curfew Violation", Exit staff, Exit news, 24 March 2020.

[456] For an overview of other Covid-19 related issues in relation to the right to free expression see: https://ipi.media/media-freedom-violations-in-the-eu-under-covid-19/ "Media freedom violations in the EU under COVID-19" International Press Institute news, 20 April, 2020; For a global overview, see https://ipi.media/covid19-media-freedom-monitoring/ "COVID-19: Number of Media Freedoms Violations by Region", International Press Institute (IPI) Tracker

c. Permitted interferences with the right to freedom of expression

Legitimate aims

Article 10 § 2 permits restrictions on the right to freedom of expression for the protection of health and for the prevention of disorder. However, the Court has frequently emphasised the need to interpret these exceptions narrowly, and where restrictions on expression have been permitted for the protection of health the Court has relied on there being a large consensus of opinion across States in favour of permitting the restriction.[457]

Global health emergencies such as the Covid-19 pandemic do generate rumours, mis- and disinformation which may cause harm to public order, health and safety, lead to distrust in the government and cause people not to follow regulations and guidance introduced to protect their health and safety.[458] Combatting the spread of disinformation to protect public health and order would therefore constitute a legitimate aim, in pursuit of which freedom of expression may be limited. For example, the exceptional circumstances of the pandemic may compel journalists to refrain from disclosing government-held information intended for restricted use – such as, for example, information on future measures to implement a stricter isolation policy, where this is required to ensure the safest and most effective implementation of the policy.[459] States have also been encouraged to work closely with online platforms to collaborate to combat disinformation spread online, for example by introducing guidelines and procedures to suspend the social media accounts or limit the expression of those spreading disinformation about vaccines and the pandemic more widely.[460] In

[457] See *Société de conception de presse et d'édition et Ponson v. France*, judgment of 5 March 2009, no. 26935/05, § 53 where the Court permitted a restriction on advertising tobacco products

[458] See https://rm.coe.int/09000016809eca31 "Access to information as an essential condition for accountability and citizen participation in public", Presentation of the Council of Europe, 23 June 2020

[459] See https://rm.coe.int/09000016809eca31 "Access to information as an essential condition for accountability and citizen participation in public", Presentation of the Council of Europe, 23 June 2020

[460] See the monthly reports produced as part of the EU Commission's disinformation monitoring programme, available here: https://digital-strategy.ec.europa.eu/en/policies/covid-19-disinformation-monitoring for example, in November 2020, Facebook reported that it had updated its advertising policies to reject adverts that discourage people from getting vaccines, and in November 2021 reported that 110,000 pieces of content were removed on Facebook and Instagram in the EU for violating COVID-19 and vaccines misinformation policies.

addition, it is a relevant consideration that the publication of information about people being infected or being treated with Covid-19 might interfere with their private or family rights, protected by Article 8 of the Convention.[461]

Any measures to limit speech introduced in pursuit of these aims must, however, be exceptional, proportionate, and introduced in accordance with law.

Lawfulness

Restrictions on expression and information must be clear and predictable and contain clearly defined terms to avoid the misuse of public health concerns and fears of disorder as a pretext to prosecute media professionals or to silence critical voices.[462] The quality of law, as well as the threat of sanction regulating speech may limit free speech. There are concerns that measures introduced to prevent the spread of disinformation in the context of the pandemic could be used to label and sanction any speech critical of the government as "false information" or "information that is likely to create panic", given the breadth and ambiguity of such terms.[463] Vague and generic formulations, such as "fake news" or "causing panic", lower the quality of law, opening the door to potential abuse and disproportionate interference. States should avoid measures which are broadly and vaguely worded, lack foreseeability and/or are likely to lead to overcriminalisation. Measures to combat disinformation should also be controlled by parliaments, monitored by national human rights institutions and subject to review by constitutional or other competent courts.[464]

[461] See *Armonas v. Lithuania and Biriuk v. Lithuania*, judgment of 25 November 2008, no. 23373/03

[462] As public discourse increasingly takes place over social media platforms, and private companies are increasingly responsible for regulating and at times restricting expression on their platforms, it may also be necessary for States to work closely with such platforms to regulate their capacity to restrict speech, and to introduce laws governing their capacity to do so, to ensure any such restrictions are in accordance with law. See, for example, Facebook's suspension of the accounts of Covid-19 deniers in Germany, which was carried out in accordance with Facebook's own Community Standards, and raises questions on the extent to which States should protect individuals from suppression of speech by private companies: https://verfassungsblog.de/querdenker-suspension-fb/ "*Facebook suspends accounts of German Covid-19-deniers*", Amélie Heldt, 28 September 2021

[463] See https://rm.coe.int/16809ef1c7 "The impact of the sanitary crisis on freedom of expression and media information" Report of the Council of Europe, 7 July 2020

[464] *Incal v. Turkey*, Grand Chamber judgment of 9 June 1998, no. 22678/93; *Sahin Alpay v. Turkey*, judgment of 20 March 2018, no. 16538/17, §§ 172-184 (included as a summary in this publication); *Gözel and Özer v. Turkey*, judgment of 6 July 2010, nos. 43453/04 and 31098/05; see also https://search.coe.int/cm/Pages/result_details.

Proportionality

When assessing if an interference with the right to freedom of expression is proportionate, relevant factors include the content of the expression, the purpose behind it and the type and severity of any sanction or restriction imposed.

The content and purpose of expression

The Court has consistently emphasised that expression which concerns matters of public interest should benefit from heightened protection. States are afforded a narrow margin of appreciation in this context and any restrictions to expression concerning matters of public interest must be subject to special justification. Speech that concerns matters of public health,[465] questions that relate to the protection of health and scrutiny of the amount of information provided by the authorities on risks to public health have all been found by the Court to constitute matters of public interest that should benefit from an elevated level of protection.[466] Any restrictions on such forms of speech should therefore be subject to rigorous scrutiny.

The Council of Europe has reaffirmed the importance of protecting the right to freedom of expression as an essential element of combatting the spread of Covid-19.[467] The free exchange of accurate information is vital to enable people to understand the public health situation and what measures they should take to keep themselves and others safe and well. Access to information and public scrutiny in the media and by other organisations is particularly important to ensure public accountability during a public health emergency, as this forms an essential check on executive powers, whilst other checks and balances on government action are removed or eased due to the emergency situation.[468]

aspx?ObjectID=09000016805ae60e "Guidelines on protecting freedom of expression and information in times of crisis", § 19, Guidelines of the Council of Europe, 26 September 2007

[465] *Hertel v. Suisse*, judgment of 25 August 1998, no. 25181/94, § 47

[466] *Mamere v. France*, judgment of 7 November 2006, no. 12697/03 where a high level of protection was afforded to speech which was found to form part of an extremely important public debate focused in particular on the insufficient information the authorities gave the population regarding the levels of contamination to which they had been exposed and the public-health consequences of that exposure.

[467] See https://rm.coe.int/09000016809eca31 "Access to information as an essential condition for accountability and citizen participation in public", Presentation of the Council of Europe, 23 June 2020

[468] See https://rm.coe.int/respect-for-democracy-hu-man-rights-and-rule-of-law-during-states-of-

Heightened protection for freedom of expression which helps play a 'public watchdog' role is often found in cases involving the media, but is not limited to such cases, and extends for example to small and informal campaign groups.[469] The Court has also acknowledged that online sources of information contribute significantly to increasing public access to news and information, meaning bloggers and popular users of social media may also be categorised as 'public watchdogs' and benefit from heightened protection for any expression informing people about or presenting a critical response on matters of public interest.[470]

Whilst the Court has accepted that public confidence in the authorities is an important factor in successful crisis management, this factor has not outweighed the importance of ensuring free expression of questions about and criticism of government responses to a health crisis. The Court has found instead that those responsible for the response to crisis situations must themselves win public confidence, without relying on restrictions on expression to do so.[471]

The type of restriction

Where freedom of expression is limited in pursuit of a legitimate aim, the limitation must be the least restrictive means of achieving this aim.[472] For example, during the pandemic, it might have been necessary to limit physical access to press conferences to protect the health of potential attendees. However, it remained possible to actively engage with the media through holding physically distanced press conferences, or video conferences.[473] The aim of protecting health would not, for example, necessitate complete restrictions on access to press conferences, or limits on follow up questions at conferences. Restricting

e/16809e82c0 "Respect for Democracy Human Rights and Rule of Law during States of Emergency – Reflections: restricting freedom of expression in emergency contexts would deprive the public of an essential check on the increased executive powers", Report of the Venice Commission, 26 May 2020

[469] *Steel and Morris v. United Kingdom*, judgment of 15 February 2005, no. 68416/01

[470] *Magyar Helsinki Bizottság v. Hungary*, Grand Chamber judgment of 8 November 2016, no. 18030/11, § 168 (included as a summary in this publication)

[471] *Mamere v. France*, judgment of 7 November 2006, no. 12697/03

[472] *Women on Waves v. Portugal*, judgment of 3 February 2009, no. 31276/05, § 41 (included as a summary in this publication)

[473] See https://europeanjournalists.org/blog/2020/04/15/good-practices-for-press-conferences-during-pandemic/ "Good practices for press conferences during COVID-19 pandemic", European Federation of Journalists news, 15 April 2020

access to information may reduce public trust, confidence and cooperation with the government response to the pandemic, thereby hindering, rather than advancing the aim of protecting health.

Further, banning certain types of speech may not be the least restrictive means of preventing the spread of disinformation. This aim might also be served by governmental information campaigns, open communication to the public to promote trust and cooperation, and cooperation with online platforms and the media to prevent the manipulation of public opinion and to give prominence to trusted sources of news and information, in particular those communicated by public health authorities. Ethical and responsible journalism has also been found to be an efficient antidote to mis- and disinformation.[474]

If it was deemed necessary to impose sanctions for spreading disinformation which is harmful to efforts to combat Covid-19, sanctions are more likely to be found to be proportionate if they are imposed ex post facto, and if they are targeted to particular speech. The Court is unlikely to find prior censorship of certain topics, or outright blocking of access to entire online platforms or websites to be justified. Prior restraints on publication are subject to strict control and an obligation during the pandemic to only publish 'official' information, for example, is likely to be deemed an excessive interference with the right to freedom of expression.[475]

Among the post-expression restrictions on expression, the imposition of criminal sanctions is rarely found to be proportionate. The Court considers that the imposition of a custodial sentence, including a suspended sentence, for a media-related offence will only be compatible with Article 10 in exceptional circumstances, where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.[476] Such a sanction is deemed to have a chilling effect on speech and is seen to be particularly dangerous in cases

[474] *Bédat v. Switzerland*, Grand Chamber judgment of 29 March 2016, no. 56925/08, § 58; *Magyar Jeti Zrt v. Hungary*, judgment of 4 December 2018, no. 11257/16, § 64

[475] *RTBF v. Belgium*, judgment of 29 March 2011, no. 50084/06, § 114; *The Sunday Times v. the United Kingdom (No. 2)*, judgment of 26 November 1991, no. 13166/87, § 51; *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, no. 13585/88 where it was found that a delay in publication, even for a short period, can deprive information of all its value and interest.

[476] *Mahmudov and Agazade v. Azerbaijan*, judgment of 18 December 2008, no. 35877/04, § 50

of political speech and public interest debate.[477] Even in cases where speech led to disinformation, and the journalist failed to observe the ethics of journalism by reporting information without first checking its veracity, the Court found that the imposition of a suspended custodial sentence was disproportionate.[478] Disciplinary proceedings which resulted in a ban on any critical expression in the medical profession also violated Article 10, as did a disciplinary reprimand of a doctor, who raised public concerns about decisions made by their superior and the quality of medical care given to patients.[479]

The Court has asserted that public emergencies must not serve as a pretext for limiting freedom of political debate.[480] Given the Court's emphasis on the importance of free discussion and public scrutiny on matters relating to public health, to be consistent with Article 10, any restrictions on speech during the pandemic should avoid imposing criminal sanctions and be implemented only as a last resort after other, less intrusive means to combat disinformation have been found to be ineffective.

[477] *Lewandowska-Malec v. Poland*, judgment of 18 September 2012, no. 39660/07, § 70

[478] *Sallusti v. Italy*, judgment of 7 March 2019, no. 22350/13 (included as a summary in this publication)

[479] *Frankowicz v. Poland*, judgment of 16 December 2008, no. 53025/99, § 51; *Sosinowska v. Poland*, judgment of 18 October 2011, no. 10247/09

[480] *Sahin Alpay v. Turkey*, judgment of 20 March 2018, no. 16538/17, §§ 172-184 (included as a summary in this publication)

9. Article 11 – Right to freedom of association and manifestation

Article 11 of the ECHR provides:

> *"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
>
> *2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."*

a. Scope of Article 11

Article 11 protects the rights of people to gather in public and private locations, where their intention is to peacefully assemble. Organising and attending protests, marches, demonstrations, counter demonstrations, press conferences and meetings all fall within the scope of Article 11. The right does not however protect intentionally violent protests or gatherings.

The Court views the right to freedom of peaceful assembly as one of the fundamental rights and foundations of a democratic society and recognises that participation in the democratic process is, to a large extent, achieved through belonging to associations in which citizens can integrate with each other and pursue common objectives collectively.[481] The Court has therefore held that Article 11 should not be interpreted restrictively.[482]

The aims of Article 11 include protecting the freedom to form and express opinions and securing a public forum for debate, expression and protest. The right

[481] *Moscow Branch of the Salvation Army v. Russia*, judgment of 5 October 2006, no. 72881/01, § 61

[482] *Djavit An v. Turkey*, judgment of 20 February 2003, no. 20652/92, § 56; *Kudrevičius and Others v. Lithuania*, Grand Chamber judgment of 15 October 2015, no. 37553/05, § 91

to assembly is therefore closely linked with the right to freedom of expression under Article 10. However, whilst Article 10 covers the right to express opinions, Article 11 recognises the power of expressing such opinions collectively. The Court has attached importance to the fact that those participating in an assembly are not only seeking to express their opinion, but to do so together with others.[483]

The scope of Article 11 also extends beyond the right to express political opinions. It protects assemblies of an essentially social character, as well as religious, cultural and spiritual gatherings. The Court has affirmed that, in addition to political parties, assemblies and associations which seek to protect cultural or spiritual heritage, pursue socio-economic aims, proclaim or teach religion, seek an ethnic identity or assert a minority consciousness are also important to the proper functioning of democracy. Article 11 is therefore also closely connected with Article 9, freedom of religion, as it protects the right to collective worship.

It is also possible, in exceptional circumstances, for an individual or an association to claim to be a victim of an interference with their Article 11 rights where they must cancel or refrain from organising a public protest or demonstration in order to avoid sanctions, even where such sanctions have not yet been imposed.[484]

b. Permitted interferences with the right to freedom of association and manifestation

The measures taken by States to respond to the Covid-19 pandemic clearly interfered with the rights to assembly, association, and manifestation protected under Article 11.[485] Core aspects of government responses to the pandemic included preventing people from meeting with anyone outside their household,

[483] *Primov and Others v. Russia*, judgment of 12 June 2014, no. 17391/06, § 91

[484] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 42 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[485] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 75 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case. However, it was not disputed by either party that the prohibition on public meetings constituted an interference with the right to freedom of association.

restricting the number of people that may gather together at one time[486] and the closure of public and private spaces where meetings may have been held. Cultural, religious and political events across Europe were cancelled and social gatherings were either banned completely or limited in size. Many people adopted alternative forms of communication and expression, largely by doing so online, but it is the collective element at the core of Article 11, by which people seek to act and express themselves together, which has been impacted most severely by lockdown and social distancing measures.

The extent to which limitations on the right to assembly may be justified was drawn into particularly sharp focus when, following the death of George Floyd on 25 May 2020 in the United States of America, Black Lives Matter protests took place across Europe, and the world, involving thousands of participants and in some cases also involving a breach of social distancing regulations and restrictions on large gatherings.

Article 11 allows for restrictions on the right to assembly for the protection of public health and the protection of the rights and freedoms of others, and States can clearly argue that the limits they have imposed on gatherings in response to the pandemic fall within the scope of these exceptions.[487] However, such limitations will breach Article 11 unless they are prescribed by law and represent a necessary means by which to protect public health. Both the scope of the restrictions and their enforcement must remain proportionate to the aim of protecting public health.

Prescribed by law

To comply with Article 11, measures must have a legal basis in domestic law and be phrased in sufficiently clear and accessible terms to guard individuals

[486] For example the decision of 13 March 2020 by the French Prime Minister to prohibit gatherings of more than 100 people https://www.gouvernement.fr/info-coronavirus/les-actions-du-gouvernement "Les actions du Gouvernement", Statement of the French Government, 28 May 2020

[487] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 80 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case. However, it was not disputed by either party that the prohibition on public meetings during the pandemic pursued the legitimate aims of protecting health and the rights and freedoms of others.

against arbitrary interferences with their right to assembly. Many of the initial lockdown and social distancing measures introduced by governments specified that individuals should not meet any person from outside their household, and that they should remain a certain distance, usually between 1-2 metres, away from others in public spaces. However, as lockdown measures began to ease, the exact scope of the restrictions on association was not always clear.

The Court has accepted that absolute clarity regarding the consequences of peoples' actions may be impossible to attain, as laws must maintain a level of flexibility to accommodate for changing circumstances.[488] However, legal discretion must not be granted in the form of unfettered power and the law must indicate with sufficient clarity the scope of any discretion and the manner of its exercise. Where restrictions on gatherings are couched in vague, broad language they may not meet this standard of legality. Some examples include:

i) In Croatia, a prohibition was placed on gathering in public places where a 'large number of people' can meet, but 'large number' was not defined further.[489]
ii) In Ireland, events were prohibited where, by virtue of the nature, format, location or environment of the event, they could 'reasonably be considered to pose a risk of infection with Covid-19 to persons attending the event'.[490]
iii) The Paris Observatory of Public Freedoms' report on the implementation of the containment measures adopted by the French authorities criticised a lack of precision in the legal framework surrounding the monitoring missions of police forces, highlighting that this had led to arbitrary decisions and enforcement of the regulations.[491]

Such provisions risk arbitrary interferences with the right to assembly where the police and the public could easily interpret the provisions differently to

[488] *Ezelin v. France*, judgment of 26 April 1991, no. 11800/85, § 45

[489] See https://www.koronavirus.hr/odluka-o-mjeri-strogog-ogranicavanja-zadrzavanja-na-ulicama-i-drugim-javnim-mjestima/260 "Odluka o mjeri strogog ograničavanja zadržavanja na ulicama i drugim javnim mjestima", Report of Koronavirus.hr, 26 August 2020.

[490] See http://www.irishstatutebook.ie/eli/2020/act/1/section/10/enacted/en/html "Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020", Legislation of the Irish Statute Book

[491] See https://www.ldh-france.org/wp-content/uploads/2019/04/Obs-paris_Point-droit-confinement.pdf "Point droit - confinement", Document of L'Observatoire parisien des libertés publiques", 25 March 2020

each other. To ensure compliance with Article 11, any restrictions on gatherings imposed should be phrased in terms as clear as feasible in the circumstances, for example specifying the exact number of people permitted to meet at one time, to limit the risk of arbitrary interference with the right to association.

Necessary in a democratic society

Measures which interfere with the right to freedom of peaceful assembly will breach Article 11 unless they are "necessary in a democratic society". This means that they must answer a pressing social need, be proportionate means of responding to that pressing social need (for example proportionate means of pursuing the aim of protecting public health) and the reasons invoked to justify the measure must be "relevant and sufficient".

The Court has previously upheld significant restrictions on public gatherings (for example limits on location or the numbers participating) where the aim was to protect public safety or to preserve public order[492] and the Court did not find a breach of Article 11 where a gathering was dispersed to protect the health and safety of those participating.[493] However, these restrictions did not relate to general bans on gatherings, they were targeted to containing the particular risk posed by the demonstrations in question.

The nature of the restriction on assembly

The Court generally affords States a narrower margin of appreciation where they seek to impose general indiscriminate bans on demonstrations.[494] To justify a general ban, a State must demonstrate that there is a real danger which cannot be prevented by other, less stringent measures.[495] It must take account of the

[492] See *Chappell v. United Kingdom*, Commission decision of 14 July 1987, no. 12587/86; *Rai, Allmond and "Negotiate Now" v. United Kingdom* admissibility decision of 6 April 1995, no. 25522/94

[493] *Cisse v. France*, judgment of 9 April 2002, no. 51346/99 (included as a summary in this publication)

[494] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, §§ 85-86 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[495] See for example, the order of the French Council of State of 13 June 2020, nos. 440846, 440856,441015 which suspended the operation of an article of a decree prohibiting public gatherings of more than 10 people. The Council of State found that, in light of the importance of the right to protest, there should be an exception to

effect of the ban and conclude that the disadvantages caused by the ban are clearly outweighed by the security considerations, and that there are no other possible ways of avoiding these undesirable effects, for example by reducing the scope or duration of the ban.[496] The duration of the ban will also, more generally, be a relevant factor to any proportionality exercise.[497]

Not every State has found a general, indiscriminate ban on gatherings to be necessary in the context of combatting the Covid-19 pandemic. For example:

i) In Denmark the law introduced to impose a limit on the number of people permitted to meet each other contained an exemption for opinion-shaping assemblies, including demonstrations and political meetings.
ii) In Germany, the Constitutional Court ruled that Covid-19 related restrictions should not automatically outweigh the right to freedom of assembly. It held instead that officials must examine bids to hold demonstrations on a case-by-case basis, taking into account whether organisers could agree on a lower number of participants combined with physical spacing to arrange demonstrations at locations and times which did not pose a substantial risk to health.[498]

The impact of the pandemic and the resources available to police demonstrations and to ensure sufficient medical officers are present will vary from State to State. The approach taken in Germany and Denmark for example, may not necessarily be available in other States. However, these examples demonstrate that alternative approaches exist. To avoid breaching Article 11, States which imposed a blanket ban on demonstrations must be able to demonstrate why no other, less

this general provision in the case of public demonstrations or protests, where other protective measures could be adhered to, such as wearing a mask and ensuring social distancing took place and where the demonstration would not bring together more than 5,000 people.

[496] *Christians against Racism and Fascism v. the United Kingdom*, admissibility decision of 16 July 1980, no. 8440/78

[497] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 91 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case. The third section of the Court found, in this case, that a general prohibition on assembly for just over two months between March to May 2020 was of considerably long duration.

[498] See https://www.dw.com/en/germanys-top-court-overturns-stuttgarts-protest-ban/a-53175992 "Germany's top court overturns Stuttgart's protest ban", DW news, 18 April 2020

restrictive form of regulating demonstrations was possible, for example why they did not provide the option for demonstrators to apply for an exemption from any general ban, for example the option to apply for permission to carry out socially distanced demonstrations, with limited attendees.[499]

Alternative means of assembly and manifestation

Another factor relevant to assessing the proportionality of a restriction on assembly is whether there are alternative means by which the message of a demonstration can be shared, or by which an association can carry out the activities it would have carried out when assembling together, for example through holding meetings online. Throughout the pandemic, citizens engaged in alternative forms of assembly and protest for example, in Croatia and Kosovo, protesters banged pots and pans from their balconies in protest against the government, in Hungary, an online protest against the Hungarian Government's response to Covid-19 was organised by a digital organising platform and viewed by around 40,000 people[500] and in Germany activists painted footprints on various state institutions to show solidarity with migrants and refugees in camps across Europe.[501]

The availability of alternative forms of protest may help to justify temporary bans on assembly, but the longer the duration of the restriction on assembly, the less weight such alternative forms of protest will carry. Article 11 recognises the importance of expressing a message together. Watching online videos and protesting from the window of an apartment block do not provide a complete substitute for that. Longer term restrictions on the right to assemble will be particularly hard to justify where alternative forms of protest are predominantly online, and where I.T. illiteracy or lack of access to sufficient internet connection may prevent those who would otherwise join a demonstration from becoming involved.

[499] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 91 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[500] See https://civitates-eu.org/the-covid-19-crisis-shows-the-need-for-civil-society-to-be-stronger-than-ever-not-only-in-hungary/ "The covid-19 crisis shows the need for civil society to be stronger than ever, not only in Hungary", civitates, 4 April 2020

[501] See https://www.infomigrants.net/en/post/23906/leave-no-one-behind-protests-for-migrants-in-times-of-coronavirus "'Leave No One Behind': Protests for migrants in times of coronavirus", E. Wallis, Info Migrants news, 6 April 2020

The purpose of the assembly or manifestation

Whilst protests should rarely be banned because of the substance of the message which participants wish to convey, the purpose of a demonstration may also be relevant to the proportionality assessment. The Black Lives Matter protests during the pandemic exemplify this in two respects. Firstly, a positive obligation to secure the effective enjoyment of freedom of assembly is of particular importance for persons belonging to minorities, who are more vulnerable to victimisation.[502] The aim of these protests was to elevate the voices of ethnic minorities vulnerable to victimization and discrimination as a result of their minority status. Further, to restrict a demonstration, States must consider the harms caused by not permitting a demonstration to take place and conclude that the benefits of restricting assembly outweigh these harms. Limits on protests concerning the threats to life and the risk of inhuman and degrading treatment caused by racial discrimination may require greater justification because the protests concern potential breaches of other Convention rights, including Articles 2, 3 and 14. Some protestors argued, for example, that to refrain from action and assembly posed more risk to their right to life and protection from inhuman and degrading treatment than the risk posed by the spread of Covid-19.

Enforcement of the restriction

The proportionality of enforcement measures and the nature and severity of any sanctions for participation in a gathering or demonstration must also be taken into account in a proportionality assessment. A peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction.[503] However, a fine of €3 for participation in a demonstration without applying for authorisation has been found by the Court to constitute a proportionate penalty,[504] as has a fine equivalent to about €500 for organising an unlawful assembly in a designated

[502] *Bączkowski and Others v. Poland*, judgment of 3 May 2007, no. 1543/06, § 64

[503] *Akgöl and Göl v. Turkey*, judgment of 17 May 2011, nos. 28495/06 and 28516/06, § 43; *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 91 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case. Any person who deliberately violated the prohibition on assembly in this case was liable to a custodial sentence not exceeding three years or to a fine. These were deemed to be very severe penalties, liable to have a chilling effect on potential participants or groups seeking to organise such events.

[504] *Ziliberberg v. Moldova,* admissibility decision of 4 May 2004, no. 61821/00

security sensitive area.[505] Excessive fines will however require greater justification. Albania's introduction of a fine equivalent to €40,000 for a breach of the ban on social, cultural or political gatherings has for example been criticised by human rights organisations who argue the penalties are disproportionate.[506] To justify such large fines, it will be necessary for governments to demonstrate that less punitive measures could not have fulfilled the purpose of protecting health as effectively.

[505] *Rai and Evans v. the United Kingdom*, admissibility decision of 17 November 2009, nos. 26258/07 and 26255/07

[506] See https://balkaninsight.com/2020/03/16/albania-mounts-millionaire-fines-against-covid-19/ "Albania Adopts Punitive Fines for Breaching Coronavirus Restrictions", G. Erebara, Balkan Insight news, 16 March 2020

10. Article 3 of Protocol No.1 - Right to vote

The restrictions imposed on free movement and assembly during the pandemic impacted States' ability to hold elections, and candidates' capacity to campaign in them. Elections were postponed across the globe, including general, presidential, and local elections and national referendums.[507] Article 3 of Protocol No.1 (A3P1) of the Convention protects the right to vote and the right to stand for election,[508] it provides:

> *"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."*

a. Scope of Article 3 of Protocol No.1

A3P1 relates to the 'choice of legislature', meaning its protections do not generally extend to local elections,[509] referendums,[510] or presidential elections. It is not, however, restricted to national legislatures, for example it may cover elections to the European Parliament.[511] Under this provision, elections to choose

[507] See https://www.coe.int/en/web/electoral-assistance/elecdata-covid-impact; "Impact of COVID-19 on elections and referenda in Europe", Report of the Council of Europe, June 2020; https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections; "Global Overview of COVID-19: Impact on elections", Report of International Idea, 18 March 2020; and https://www.economist.com/graphic-detail/2020/08/17/the-pandemic-is-affecting-elections-around-the-world "Daily chart - The pandemic is affecting elections around the world", The Economist news, 17 August, 2020

[508] *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, no. 9267/81, §§ 48-51; Ždanoka v. Latvia, Grand Chamber judgment of 16 March 2006, no. 58278/00, § 102

[509] See in relation to municipal elections: *Xuereb v. Malta*, admissibility decision of 16 June 2000, no. 52492/99; *Salleras Llinares v. Spain*, admissibility decision of 12 October 2000, no. 52226/99; and in relation to regional elections: *Malarde v. France*, admissibility decision of 15 September 2000, no. 46813/99

[510] *Moohan and Gillon v. the United Kingdom*, admissibility decision of 13 June 2017, nos. 22962/15 and 23345/15, § 40;

[511] *Matthews v. the United Kingdom*, Grand Chamber judgment of 18 February 1999, no. 24833/94, §§ 45-54; *Occhetto v. Italy*, admissibility decision of 12 November 2013, no. 14507/07, § 42

a legislature must be held at 'regular intervals' and ensure the 'free expression of the opinion of the people'.

Determinations on whether elections are held at reasonable intervals must be made in light of the purpose of parliamentary elections, which is to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. States must balance the need to allow Parliament to sit for long enough to develop and execute long term legislative plans (thereby enabling them to implement the will of the electorate), whilst ensuring that legislators do not remain in office so long that they no longer reflect the will of the electorate.[512]

The Covid-19 pandemic therefore interfered with A3P1 in two respects:

i) The postponement of elections risks enabling those in power to undemocratically extend their mandate to remain in power when they no longer represent the will of the people, in breach of the right to vote and the requirement to hold elections at reasonable intervals.
ii) Holding an election during the pandemic risks limiting the capacity of candidates to campaign, reducing voter turnout because of this and because of voters' fears for their safety. This would potentially undermine the legitimacy of the newly elected legislature, thereby failing to ensure the 'free expression of the opinion of the people'.[513]

b. Permitted interferences with the right to vote

Unlike Articles 8-11 of the Convention, A3P1 does not include a specific list of "legitimate aims", in pursuit of which the right to vote can be limited. The concept of "implied limitations" applies and States can rely on aims not listed in the Convention to justify restrictions to the right. The Court does not apply the tests of "necessity" or "pressing social" need when assessing if a restriction is justified. Instead, any aim pursued must be compatible with the principle of the rule of law and the objectives of the Convention, and the measure taken to pursue the aim must not be arbitrary or disproportionate.

[512] *Timke v. Germany*, admissibility decision of 11 September 1995, no. 27311/95

[513] See https://rm.coe.int/election-and-covid-19/16809e20fe "Elections and Covid-19", Recommendations of the Council of Europe, 29 March 2020

Legitimate Aim

Protecting Health

Protecting the health and safety of voters, campaigners, and election workers by postponing elections, to limit their risk of contracting Covid-19, is therefore likely to constitute a legitimate reason to restrict the right to vote.[514] Risks to health may arise from large numbers attending and working at polling stations, and even postal votes may give rise to health concerns as they must still be handled, opened and counted by groups of staff.

Protecting the free expression of the will of the people

Protecting the free expression of the will of the people may constitute another legitimate reason to restrict the right to vote during the pandemic, where risks to health are reduced. Concerns about contracting Covid-19 may impact voter turnout even if assembling in large groups at voting stations is officially permitted by the State.[515] Elections may need to be postponed where there is a risk that the result of an election will not properly represent the views of the electorate, if voters are too concerned about contracting Covid-19 to turnout to vote.

[514] The first round of French regional elections took place on 15 March 2020 but the second round, initially planned for 22 March 2020 was held only on 28 June 2020. For an interesting legal analysis see https://www.lemonde.fr/idees/article/2020/03/19/municipales-le-maintien-des-elections-acquises-au-1er-tour-et-le-report-du-2nd-tour-en-juin-est-la-solution-la-plus-juste_6033697_3232.html "Municipales : « Le maintien des élections acquises au 1er tour et le report du 2nd tour en juin est la solution la plus juste »", professor of public law Romain Rambaud, Le Monde news, 19 March 2020.

[515] For example in Serbia elections were initially postponed, but then held on 21 June 2020 and turnout was estimated to be around 48%, about 8 or 9% lower than the previous Parliamentary elections: https://balkaninsight.com/2020/06/25/why-everyone-lost-out-in-serbias-elections/ "Why Everyone Lost Out in Serbia's Elections", F. Bieber, Balkan Insight news, 25 June, 2020. Questions were then raised over the decision to remove lockdown restrictions ahead of the election, when lockdown measures were subsequently re-introduced after a spike in cases: https://balkaninsight.com/2020/07/08/serbia-rocked-by-violent-clashes-around-parliament/ "Serbia Rocked by Violent Clashes Around Parliament", S. Dragojlo, Balkan Insight news, 8 July, 2020; See also in France where voter turnout for the election was a historic low at approximately 46 percent, compared with 63.5 percent during the 2014 local elections and low turnout was attributed to voters' fears of being infected: https://www.euronews.com/2020/03/15/france-voters-take-to-the-polls-amid-coronavirus-fears "Record low turnout in French municipal elections amidst coronavirus fears", Euronews, 16 March 2020.

Legality

Restrictions must also be introduced in accordance with the rule of law, including in accordance with procedures contained in domestic law. The quality of the decision-making process preceding the imposition of a restriction on the right to vote will be relevant to a decision regarding its justification. Where a State can demonstrate that its legislature participated in a considered debate, weighing up the competing interests involved before concluding that a restriction should be introduced, it is more likely to be considered justified by the Court.[516]

Proportionality

Whilst States have a wide margin of appreciation to determine the legitimate aim which is used to justify a restriction on the right to vote, the Court is stricter in its proportionality review of measures interfering with A3P1, particularly where a measure impacts the ability to vote.[517] Democracy constitutes a fundamental element of the "European public order", and the rights guaranteed under A3P1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.[518] Restrictions on the right to vote must therefore be temporary, and any elections postponed due to the pandemic should be held as soon as it is safe to do so.

c. The right to participate in an election campaign

A3P1 also includes the right to stand for election, including the right to conduct an election campaign. The Covid-19 pandemic posed multiple obstacles to conducting a political campaign. Restrictions on gatherings and travel meant that traditional campaign techniques such as holding rallies, door stepping, and substantial travel were not possible.

[516] See *Shindler v. the United Kingdom*, judgment of 7 May 2013, no. 19840/09, § 117 where the Court found it pertinent that Parliament had sought, more than once, to weigh up the competing interests, and had debated in detail the question of the voting rights of non-residents and the evolution of opinions in Parliament was reflected in the amendments to the relevant legislation.

[517] *Aziz v. Cyprus*, judgment of 22 June 2004, no. 69949/01, § 28; *Tănase v. Moldova*, Grand Chamber judgment of 27 April 2010, no. 7/08, § 158

[518] See *Ždanoka v. Latvia*, Grand Chamber judgment of 16 March 2006, no. 58278/00, §§ 98 and 103; *Tănase v. Moldova*, Grand Chamber judgment of 27 April 2010, no. 7/08, § 154

The Court has previously held that there was no breach of A3P1 where a politician complained that his conditions of house arrest prevented him from equal participation in legislative elections. The Court found that he was able to campaign from his home[519] and there is an argument that the evolution of online campaigning methods means an effective campaign could be carried out from a politician's home during the pandemic. However, in this case, it was also relevant that members of the applicant's party had participated in meetings with voters in person, where he was not able to, and that his house arrest had not prevented his participation to the point that the final result was affected. Such a situation can be distinguished from the context of the Covid-19 pandemic, where restrictions sometimes meant that no candidates were able to meet voters in person, and instead entire campaigns were run entirely online, potentially preventing them from reaching a substantial number of potential voters (especially those who are I.T. illiterate). The proper organisation of elections was therefore more likely to be influenced by restrictions such as lockdowns, the requirement to ensure the 'free expression of public opinion' was less likely to be achieved and A3P1 more likely to have been breached.

The right to freedom of expression and the right to freedom of assembly are closely related to the right to participate in an election campaign. Freedom of expression and meetings with the electorate are viewed as a necessary condition to ensure the free expression of the opinion of the people in the choice of the legislature and it is particularly important in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely.[520] In addition to the restrictions on meetings in person, media attention and online discussion were heavily focused on the pandemic. This may have inhibited the capacity for information and opinions on issues relevant to an election (aside from Covid-19) to circulate sufficiently to deem elections taking place in the midst of the pandemic to be fair and fully informed.

This may give rise to another issue under A3P1 if elections followed a period in which representatives of the parties in power dominated media coverage due to extensive coverage having been dedicated to discussion of their response to the pandemic, at the expense of any airtime being provided to other candidates.[521]

[519] *Uspaskich v. Lithuania*, judgment of 20 December 2016, no. 14737/08

[520] *Bowman v. the United Kingdom*, judgment of 19 February 1998, no. 24839/94, § 42

[521] See concerns in Poland over the incumbent President's domination and control of the media ahead of the election: https://www.institutmontaigne.org/en/blog/parliamentary-elections-poland-era-covid-19 "Presidential Elections in Poland, in the Era of Covid-19", R. Kravosky, Institute Montaigne, June 18, 2020

A3P1 does not guarantee any right for a political party to be granted airtime on television or radio during an election campaign, but an issue may arise where one party is denied the right to any kind of broadcast, if other parties are granted such broadcasting rights.[522]

d. Holding elections during the pandemic

If States decide to hold elections whilst freedom of movement and assembly are limited[523] and whilst public discussion and debate remains dominated by news of an emergency such as the Covid-19 pandemic, they must take specific measures to encourage free and public debate before an election so that votes are free and informed. This may involve, for example, allocating more broadcasting rights and media coverage to opposition parties where media coverage is otherwise dominated by those already in power.

Any new methods of voting should be carefully planned and introduced in accordance with domestic law sufficiently in advance of the election so that people are not denied the right to vote due to practical issues arising from the implementation of a new system. Voters must also be made aware of how exactly to register for and use any new voting system. [524] Whilst States may not be obliged to introduce a system to ensure elections can take place during the pandemic, if they choose to do so it must be done in a way that respects the right to vote for all; the existence of organisational obstacles and additional costs are unlikely to justify any restriction on voting rights in this context.[525]

[522] *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, admissibility decision of 29 November 2007, nos. 10547/07 34049/07

[523] See the sections on Article 2 of Protocol No. 4 (Right to freedom of movement, including to leave and enter one's country) and Article 5 (Right to liberty) within this publication for further discussion on restrictions on movement and assembly and the section on Article 11 (Right to freedom of association and manifestation) within this publication for further discussion on restrictions on assembly.

[524] See *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, admissibility decision of 29 November 2007, nos. 10547/07 34049/07, see also the finding of the Polish Supreme Court that the new electoral law introduced during the pandemic was unconstitutional because it would transform the Polish Post Office into an electoral body with no guarantee that the vote would be effectively counted, it was not clear how citizens could put ballots into the mail boxes and there was no procedure for if votes were lost: https://www.institutmontaigne.org/en/blog/parliamentary-elections-poland-era-covid-19 "Presidential Elections in Poland, in the Era of Covid-19", R. Kravosky, Institute Montaigne, June 18, 2020.

[525] See *Riza and Others v. Bulgaria*, judgment of 13 October 2015, nos. 48555/10 and 48377/10 where despite

Complaints concerning elections under Articles 8 and 14

It should also be noted that complaints concerning elections may be raised under other Articles of the Convention, and that such complaints apply to a wider range of elections than those within the ambit of A3P1, including regional and local elections. For example, the Court has previously found an interference with Article 8 where polling stations were not accessible to individuals in wheelchairs and they were not permitted to take ballot papers outside.[526] Article 14 may also be raised in conjunction with Article 8 or A3P1 where populations of a particular status are deprived of their right to vote. States should therefore take specific administrative measures to ensure that any new voting systems introduced accommodate for those who are particularly vulnerable, and who may continue to shield at home whilst restrictions on the movement of others are lifted. The introduction of electronic voting could assist in this respect.[527]

the fact that the organisation of fresh elections in another sovereign country might cause major diplomatic or organisational obstacles and entail additional costs, the failure to do so still constituted a breach of A3P1.

[526] *Mółka v. Poland*, admissibility decision of 11 April 2006, no. 56550/00

[527] See https://rm.coe.int/election-and-covid-19/16809e20fe "Elections and Covid-19", Recommendations of the Council of Europe, 29 March 2020.

11. Article 2 of Protocol 1 - Right to education

As an emergency response to the Covid-19 pandemic, States physically closed schools, universities and training institutions and took measures to try to deliver education remotely. States' innovative use of technology helped to protect the right to education of many students, at least to some extent, but provided less effective access to education for those without access to the requisite digital infrastructure or technical skills.

Even where the requisite technology was in place, access to education was limited in other ways. For example, some students experienced a reduction or delay in the provision of teaching and/or home-study tasks and received minimal feedback on the work they carried out, whilst direct interactions with teachers and fellow students were limited or did not take place at all. The right to education is protected under Article 2 of Protocol 1 (A2P1). The first part of A2P1 provides:

> *"No person shall be denied the right to education."*

a. Scope of Article 2 of Protocol No.1

The right to education provides individuals with a right to effective access to educational institutions which already exist.[528] It does not require States to set up new institutions, to create a public education system or to subsidise private schools,[529] but States cannot deny the right to education in the educational institutions they have chosen to set up or authorise. A2P1 concerns elementary, secondary and higher education, specialised courses and vocational training,[530] so

[528] *Şahin v. Turkey*, Grand Chamber judgment of 20 October 2011, no. 13279/05 §§ 136-137; *Belgian Linguistic Case*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, §§ 3-4

[529] *Belgian Linguistic Case*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64

[530] *Sulak v. Turkey*, admissibility decision of 17 January 1996, no. 24515/94; *Cyprus v. Turkey*, Grand Chamber judgment of 10 May 2001, no. 25781/94, § 278; *Leyla Şahin v. Turkey*, Grand Chamber judgment of 10 November 2005, no. 44774/98, § 141

the right benefits adults as well as children.[531] The State is responsible for public and private schools[532] and it cannot delegate its obligations to secure the right to education to private institutions or individuals. States also have an obligation to protect pupils in both public and private schools from ill-treatment.[533]

b. Permitted interferences with the right to education

A2P1 does not contain an exhaustive list of reasons for which the right to education may be restricted. The right is not, however, absolute. By its very nature it calls for regulation by the State[534] and it may be restricted by implicitly accepted limitations. Any limitations must however be foreseeable for those concerned, pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[535]

Legitimate Aim

The Court has accepted that protecting the health of children and teachers at school from the spread of a contagious disease is a legitimate aim in pursuit of which the right to education may be limited.[536] The widescale closure of educational institutions to protect staff and students to prevent the spread of Covid-19 will therefore be likely to be deemed to be in pursuit of the legitimate aim to protect health.

Proportionality

In order to ensure proportionality between the protection of health and the measures introduced to pursue this aim, authorities are required to act diligently and promptly to ensure that measures which are particularly restrictive and

[531] *Velyo Velev v. Bulgaria*, judgment of 27 May 2014, no. 16032/07

[532] *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, judgment of 7 December 1976, nos. 5095/71, 5920/72 and 5926/72

[533] *O'Keeffe v. Ireland*, Grand Chamber judgment of 28 January 2014, no. 35810/09, §§ 144-152

[534] *Belgian Linguistic Case*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, § 5; *Golder v. the United Kingdom*, judgment of 21 February 1975, no. 4451/70, § 38; *Fayed v. the United Kingdom*, judgment of 21 September 1994, no. 17101/90, § 65

[535] *Leyla Şahin v. Turkey*, Grand Chamber judgment of 10 November 2005, no. 44774/98

[536] *Memlika v. Greece*, judgment of 6 October 2015, no. 37991/12

onerous (for example preventing pupils from coming to school), are kept in place only for the time strictly required in order to achieve the desired aim. The measures should be lifted as soon as the grounds for imposing them cease to apply.[537] States needed therefore to monitor closely the level of risk of contracting Covid-19 posed to children and staff by re-opening schools, to ensure that schools were re-opened as soon this could be done safely. As the level of risk declined, States needed to explore whether other, less restrictive methods of protecting the health of students and teachers could be introduced, for example, devising new social distancing measures in classrooms or introducing a staggered return to schools where half the class returns on alternate days.

The right to education is viewed by the Court as indispensable to the furtherance of human rights, and any restrictions on this right must not curtail the right to such an extent as to impair its very essence and deprive it of its effectiveness.[538] States' decisions to close educational institutions and introduce remote learning systems may have helped to protect the right to education for many, to the greatest extent possible in the context of the pandemic. However, the reliance on digital solutions to effectively implement these measures meant that the right to education was not secured as effectively for those without access to the digital infrastructure required to properly benefit from remote learning.

Where a student has no access to a computer or the internet connection required to engage in remote learning systems, or lacks the requisite I.T. literacy to participate, this curtails their right to education to such an extent that the right is deprived of any effectiveness or essence. The position is analogous to education not being provided in the language spoken by the child[539] and States must consider whether they can provide resources to assist those otherwise not able to access the system of education they are providing to the population as a whole.[540]

[537] See *Memlika v. Greece*, judgment of 6 October 2015, no. 37991/12 where the school in question prevented children wrongly diagnosed with leprosy from returning to school. The Court found that the school had pursued a legitimate aim of trying to protect the health of children and teachers from the spread of the disease. However, the delay in readmitting the children to school (after it was discovered the diagnosis was wrong) violated A2P1, because the measure was not proportionate to the aim pursued and the authorities had not acted diligently or expeditiously.

[538] *Leyla Şahin v. Turkey*, Grand Chamber judgment of 10 November 2005, no. 44774/98, § 154

[539] *Belgian Linguistic Case*, judgment of 23 July 1968, nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64

[540] See the letter written by the Good Law Project to the Secretary of State for Education in the United Kingdom, making this argument. The Secretary of State subsequently announced that certain cohorts of disadvantaged

c. Discrimination and the link between Article 14 and Article 2 of Protocol No.1

The widespread reliance on remote digital solutions may also give rise to an issue under Article 14 in conjunction with A2P1. Universality and non-discrimination are fundamental principles in determining how States should carry out their duties under A2P1. Education should be inclusive, and in the context of students with disabilities, States have an obligation to make necessary and appropriate adjustments to the way education is delivered, to correct factual inequalities which are unjustified and therefore amount to discrimination.[541] The Council of Europe has recognised that the exceptional measures taken today in the framework of the fight against the spread of the virus are likely to raise questions as to their potential discriminatory consequences.[542] One of the major challenges has been the issue of ensuring inclusion and equal access to quality distance learning opportunities.[543]

Where education is mainly delivered through digital platforms, it might have a discriminatory impact on the right of access to education of those with special educational needs and disabilities,[544] as well as those from disadvantaged

children were to be given a free laptop or tablet, and 4G connectivity to access online learning: https://www.dropbox.com/s/2gscecp99josicz/GLPtoGavinWilliamson.pdf?dl=0 "Coronavirus and Access to Education", Letter of the Good Law Project to the United Kingdom Secretary of State for Education, 9 April 2020.

[541] *Çam v. Turkey*, judgment of 23 February 2016, no. 51500/08, § 64; *Sanlısoy v. Turkey*, admissibility decision of 8 November 2016, no. 77023/12, § 59.

[542] See https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1d91 "Respect for democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member states" Information Documents of the Council of Europe, 7 April 2020

[543] See https://data.consilium.europa.eu/doc/document/ST-8610-2020-INIT/en/pdf "Council conclusions on countering the COVID-19 crisis in education and training", Conclusions of the Council of European Union, 16 June 2020.

[544] For example, in December 2020, the Slovenian Constitutional Court suspended the execution of a decree temporarily banning gatherings in educational establishments for children with special educational needs and ordered the government to reopen special educational schools by 4 January 2021 at the latest. The applicants, pupils with special educational needs, represented by their parents, argued that the prohibition of assembly in educational institutions, and the provision solely of online educational services, violated their rights to education and freedom from discrimination, since they had no access to special assistance, including for example, physiotherapy, working therapy, therapies in the pool, an individualized approach and psychological treatment, which parents could not provide. The Constitutional Court found, taking account of scientific expertise, that the

socio-economic backgrounds and those living in rural or over-populated areas. Socio-economically disadvantaged learners are more likely to live in a household not conducive for home study,[545] less likely to have access to technology such as laptops and may share one electronic device between a whole family. They might not have access to broadband of a sufficient speed, or to any broadband connection at all. These problems are particularly acute in the Western Balkans region, where students have less access to laptops and high-speed connectivity than their EU peers.[546] Further, teachers, students and the parents supporting them with home learning may not have the requisite I.T. skills to engage with online learning courses, even if they are provided with the equipment.[547]

States in the Western Balkans sought to overcome the issues surrounding internet connectivity by broadcasting pre-recorded lessons on national television, which a much larger percentage of the population have access to. However, to provide lessons on television at scale, the subjects covered and the instruction time was considerably abridged,[548] meaning the right of access to education for students relying on TV was less effectively protected than it was for those with access to the requisite digital infrastructure and I.T. skills.

closure of such schools did not contribute substantially to preventing the spread of Covid-19, given the small number of children in attendance, and so could not justify the interference with the rights of children with special educational needs (see Ustavno sodišče Republike Slovenije, decision of 21 December 2020, U-I-473/20-14).

[545] See https://data.consilium.europa.eu/doc/document/ST-8610-2020-INIT/en/pdf "Council conclusions on countering the COVID-19 crisis in education and training", Conclusions of the Council of European Union, 16 June 2020

[546] See http://documents1.worldbank.org/curated/en/590751590682058272/pdf/The-Economic-and-Social-Impact-of-COVID-19-Education.pdf "The Economic and Social Impact of COVID-19", Report of the World Bank, Spring 2020 which finds on average, in the Western Balkans, about 60 percent of households have fast enough connection (defined as 10 mbps and higher) to sustain requirements for online learning.10 Mbps is lower than the standards acceptable in the EU (30 mbps). Using the EU benchmark, most households in the region are not equipped with high speed Internet. About 22% of Western Balkan students report little or no home Internet access, compared to 1% in the EU27. On average, one in ten households with Western Balkans students do not own a computer; in Albania this rises to 28%.

[547] See https://ec.europa.eu/digital-single-market/en/news/survey-schools-ict-education "Survey of schools: ICT in Education", Report of the European Commission, 8 March 2020 where it was found that more than 6 out of 10 European students are taught by teachers that develop their ICT skills on their own time.

[548] See http://documents1.worldbank.org/curated/en/590751590682058272/pdf/The-Economic-and-Social-Impact-of-COVID-19-Education.pdf "The Economic and Social Impact of COVID-19", Report of the World Bank, Spring 2020

The closure of schools also disadvantaged students with learning disabilities, who may require counselling and additional support in their learning and for whom mass broadcasts of lessons on TV may not contain any required reasonable adjustments. Whilst direct interaction with teachers and support workers is limited, students who do not live with a parent or carer who is able to support them with their remote learning will also be at a disadvantage compared to those who benefit from guidance and support from someone at home.

Obligation to take reasonable adjustments

States are under an obligation to be "particularly attentive" to the impact of their choices on how to deliver education on the right to education of the most vulnerable.[549] States must therefore pay particular attention to make sure that members of vulnerable groups continue to benefit from the right to education and have equal access to educational means and materials even in times of confinement. However, this does not necessarily equate to a positive duty to make adjustments to address any discriminatory impact identified. A difference in treatment will not to be regarded as discriminatory if it pursues a legitimate aim and is proportionate. The Court has accepted that a lack of public funds or resources may constitute a legitimate reason to justify a failure to make adjustments.[550] Even where discrimination in the right of access to education is identified, States must make reasonable adjustments only to the extent that they do not impose a disproportionate or undue burden on the State.[551]

In cases where the Court has found a breach of A2P1 in conjunction with Article 14, the authorities had at no stage attempted to identify the applicant's needs or ever even considered special accommodations in order to meet any special educational needs.[552] The Western Balkans States have taken numerous measures to mitigate to some extent the potentially discriminatory impact of the move to

[549] *Enver Şahin v. Turkey*, judgment of 30 January 2018, no. 23065/12, § 68

[550] See *McIntyre v. the United Kingdom*, admissibility decision of 21 October 1998, no. 29046/95 where the fact that it would involve the use of public funds and resources led to the conclusion that the failure to install a lift at a primary school for the benefit of a pupil suffering from muscular dystrophy did not entail a violation of Article 2 of Protocol No. 1, whether taken alone or together with Article 14 of the Convention.

[551] Çam v. Turkey, judgment of 23 February 2016, no. 51500/08, § 64; *Sanlısoy v. Turkey*, admissibility decision of 8 November 2016, no. 77023/12, § 59

[552] *Çam v. Turkey*, judgment of 23 February 2016, no. 51500/08

remote learning.[553] Such measures demonstrate that the States 'paid attention' to the impact on the most vulnerable in society of the measures introduced to deliver education remotely. Going forward, they must continue to take account of the impact on vulnerable communities of the digitalisation of education systems, which is likely to continue beyond the context of the Covid-19 pandemic, and take measures to make digital education inclusive, where this is financially and administratively possible.

[553] For example, in North Macedonia the Ministry of Education cooperated with UNICEF, donors and private companies to make distance learning opportunities more widely available: https://www.worldbank.org/en/topic/edutech/brief/how-countries-are-using-edtech-to-support-remote-learning-during-the-covid-19-pandemic; "How countries are using edtech to support access to remote learning during the COVID-19 pandemic", Brief of the World Bank. Montenegro considered an agreement with telecom operators to provide unlimited data plans for the students least likely to have reliable broadband access; Support was provided for refugee and migrant children in temporary reception centres in Bosnia and Herzegovina: https://news.un.org/en/story/2020/04/1060982 "COVID-19: from conflict to pandemic, migrants in Bosnia face a new challenge", United Nations news, 3 April 2020.

12. Article 1 of Protocol No.1 – Right to property

Lockdown measures taken to combat the spread of Covid-19 brought the closure of cafes, shops, restaurants, bars and businesses across the entertainment, sports and leisure industries. Cultural and sporting events were suspended and at certain points during the pandemic only food stores, pharmacies, post offices and banks remained open.[554] Businesses which remained open were also forced to change how they operate. The right to property protected under Article 1 of Protocol No. 1 (A1P1) of the Convention was therefore engaged. A1P1 provides:

> *"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

To benefit from the protection of A1P1, an applicant must first establish that a measure interferes with a property right, i.e. 'enjoyment of his possessions.' In line with its traditional approach of three rules,[555] the Court will then examine whether the interference constitutes:

a. A deprivation of property;
b. A control of the use of the property concerned; or
c. An interference with the general principle of respect for the peaceful enjoyment of possessions.

[554] See http://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-south-east-european-economies-c1aacb5a/ "COVID-19 crisis response in South East European economies", OECD Policy Responses to Coronavirus (COVID-19), 15 April 2020

[555] Sporrong and Lönnroth v. Sweden, plenary Court judgment of 18 December 1984, nos. 7151/75 and 7152/75

Regardless of which of the above categories an interference belongs to, to comply with A1P1, an interference with the right must serve the public interest, comply with conditions provided by law, and strike a fair and proportionate balance between the right to property and the public interest served. The above categorisation is important as it affects how the fair balance/proportionality assessment is conducted, which factors are taken into account and what weight is given to them. For example, a deprivation of possessions carries a virtually automatic right to payment of compensation[556] whereas a control of use of property may, but does not usually, require compensation.[557]

a. Peaceful enjoyment of possessions

The concept of "possessions" is an autonomous one, and the fact that a State's domestic laws do not recognise a particular interest as a "right" or even a "property right" does not necessarily prevent the interest in question from being regarded as a "possession" within the meaning of A1P1.[558] A licence to run a business[559] and the clientele of a professional practice are both examples of interests which have been found to constitute "possessions" under A1P1.[560]

b. Nature of the interference

Deprivation of property

Generally, the Court will examine a complaint as a deprivation of property only where there has been an outright expropriation of property by the State, when an applicant's property rights have been extinguished by operation of law.[561] In certain circumstances a measure may also be recognised as a de facto deprivation

[556] *Pincová and Pinc v Czech Republic*, judgment of 5 November 2002, app. 36548/97; The Court has also said that the amount of compensation granted for property taken by the State should be "reasonably related" to its value in *Broniowski v. Poland*, Grand Chamber judgment of 22 June 2004, no.31443/96, § 186.

[557] *Banér v Sweden*, admissibility decision of 9 March 1989, no. 11763/85

[558] *Depalle v. France*, Grand Chamber judgment of 29 March 2010, no.34044/02, § 68,

[559] *Megadat.com SRL v. Moldova*, just satisfaction – striking out judgment of 17 May 2011, no. 21151/04, §§ 62-63; *Bimer S.A. v. Moldova*, judgment of 10 July 2007, no. 15084/03, § 49

[560] *Könyv-Tár Kft and Others v. Hungary*, judgment of 16 October 2018, no. 21623/13, §§ 31-32

[561] For example, a statutory provision which automatically gave the use and possession of designated property to the State, with the effect that full ownership of the land was transferred to the State in *Holy Monasteries v.Greece*, judgment of 9 December 1994, nos. 13092/87 and 13984/88, §§ 60-61

of property, where the impact on the applicant's possessions of a set of measures is so profound as to make them assimilable to expropriation and tantamount to destruction of property rights.[562]

Control of the use of property

Measures less invasive than expropriation may be qualified by the Court as "control of use of property". This concept encompasses a range of measures, including revocation or change of conditions of licences affecting the running of businesses,[563] rent control systems,[564] and statutory suspension of the enforcement of orders for re-possession in respect of tenants who had ceased to pay rent.[565] A measure requiring slaughter of cattle infected with brucellosis to prevent the spread of animal diseases has also been held to constitute a "control of use".[566]

General Interference

If the measures which affected an applicant's rights cannot be qualified as either deprivation or control of use of property, the Court will examine whether the facts of the case can be interpreted as an interference with the general principle of respect for the peaceful enjoyment of possessions.[567] For example, the continuous denial of access to a person's property where she had effectively lost all control over, as well as all possibilities to use and enjoy the property, but where she remained the legal owner constituted an interference with the peaceful enjoyment of possessions.[568]

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[562] For example *Papamichalopoulos v. Greece*, judgment of 24 June 1993, no. 14556/89, §§ 44-46, where the navy took possession of the applicants' land to establish a naval base, meaning the applicants were unable to access their property or to sell, mortgage or make a gift of it, this entailed sufficiently serious de facto consequences for the Court to consider that the applicants' property had been expropriated, even in the absence of any formal expropriation decision.

[563] *Tre Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989, no. 10873/84, § 55

[564] *Mellacher and Others v. Austria*, plenary Court judgment of 19 December 1989, nos. 10522/83, 11011/84, and 11070/84, § 44; *Hutten-Czapska v. Poland*, Grand Chamber judgment of 19 June 2006, no. 35014/97, §§ 54, 160

[565] *Immobiliare Saffi v. Italy*, Grand Chamber judgment of 28 July 1999, no. 22774/93, § 46

[566] *SA Bio d'Ardennes v. Belgium*, judgment of 12 November 2019, no. 44457/11

[567] *Đokić v. Bosnia and Herzegovina*, judgment of 27 May 2010, no. 6518/04, §§ 55-56

[568] *Loizidou v. Turkey*, Grand Chamber judgment of 18 December 1996, no. 15318/89, §§ 61-64

Categorisation of the measures taken in response to the Covid-19 pandemic

Based on the principles set out above, temporary closures of, or restrictions on, the operation of businesses to prevent the spread of Covid-19 are more likely to be regarded as a control of use (or potentially a generic interference with the peaceful enjoyment of property), than a deprivation of property. So too are the measures taken to protect people from the economic impacts of the pandemic, for example preventing evictions of those in rent arrears or allowing the deferral of repayments of debt or mortgages.[569]

However, this classification could change depending on the severity of the impact of the restrictions on a business, and particularly the length for which they are applied. Whilst the restrictions on businesses were introduced as temporary measures to respond to an emergency situation, the longer they were in place, the more likely they were to cause significant harm to a business.[570] If the restrictions (even unintentionally) caused a business to collapse, for example if a business lost income or clientele to the extent that it was forced to close completely, the restrictions may amount to a deprivation of property.[571]

[569] For example, rent control legislation has been dealt with as a "control of use" in *Hutten-Czapska v. Poland*, Grand Chamber judgment of 19 June 2006, no. 35014/97, § 160 and *Aquilina v. Malta*, Grand Chamber judgment of 11 December 2014, no.3851/12; see also the judgment of the EU General Court in case T-628/20, where it decided that the Spanish solvency support fund for strategic companies experiencing temporary difficulties due to the Covid-19 pandemic was in line with Union law. Under the scheme, aid was only available to beneficiaries established in Spain. The General Court accepted that this resulted in differential treatment but found that such differential treatment was justified because it was a necessary and proportionate means of achieving the legitimate aim of remedying the serious disturbance in the Spanish economy caused by the Covid-19 pandemic.

[570] At the time of writing, the case *Toromag, s.r.o.v. Slovakia*, communicated on 5 December 2020, no. 41217/20 is pending before the Court. The case concerns the closure from March to June 2020 of fitness centres, under measures taken by the Public Health Authority of Slovakia as part of the prevention of the spread of Covid-19. The applicants, owners of those centres, complain of the pecuniary damage allegedly suffered, the loss of future income and the loss of clientele.

[571] See, for example, the decision of the Polish Supreme Administrative Court (Naczelny Sąd Administracyjny, order of 27.10.2020, I GZ 294/20 (PL)), where the applicant argued that an administrative decision that his company must repay funds breached his right to property because, in light of the losses suffered in the context of the Covid-19 pandemic, recovery of the sums would lead to the liquidation of the company, as well as the dismissal of employees. The court of first instance did not allow his appeal, because in its view, the company had not demonstrated significant risks or irreversible effects related to the payment obligation. However, the Supreme Administrative Court allowed the appeal because it did recognise the risks to the financial viability of

Legality

Any interference with the rights protected by A1P1 must meet the requirement of lawfulness.[572] The phrase "subject to conditions provided for by law" in paragraph 1 of A1P1 can be construed in the same manner as the phrase "in accordance with law" in Article 8 or "prescribed by law" in Articles 9, 10 and 11 of the Convention, discussed in the sections on these rights within this publication. Additionally, whilst A1P1 does not contain any explicit procedural requirements, it is implied by the Court that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees which afford to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities to effectively challenging the measures interfering with their A1P1 rights.[573]

c. The public interest test

An interference with A1P1 can only be justified if it serves a legitimate public (or general) interest. The notion of "public interest" in this context is extensive. The Court affords national authorities a wide margin of appreciation to determine what is in the public interest and will respect their judgment on this question unless it is manifestly without reasonable foundation.[574] Measures such as the closure of businesses or restrictions on travel to prevent the spread of Covid-19 to protect health would therefore be deemed to serve the public interest. Similarly, measures taken to protect people from the economic impact of the pandemic,

the company, if it was obliged to repay the funds in question.

[572] *Visti̇ņš and Perepjolkins v. Latvia*, Grand Chamber judgment of 25 October 2012, no. 71243/01, § 95; *Béláné Nagy v. Hungary*, Grand Chamber judgment of 13 December 2016, no. 53080/13, § 112

[573] *Capital Bank AD v. Bulgaria*, judgment of 24 November 2005, no. 49429/99 §; see also the decision of the voivodship administrative court in Opole, Poland (Wojewódzki Sąd Administracyjny w Opolu, judgment of 27.10. 2020, ISA/Op 219/20 (PL)), concerning a fine issued to the owner of a hairdressing salon for failure to comply with the temporary restrictions on business in place during the pandemic. The court held that, while the restrictions were justified in principle, the legislative technique by virtue of which they were introduced had resulted in a violation of fundamental constitutional rights in the field of freedom of enterprise. The court held that, even if the orders on which the fine was based were deemed to be in accordance with law, the contested measures would be void because they breached the basic rules of administrative procedure, as they were based solely on a note from the police, without having afforded the applicant an opportunity to present her case or actively participate in the proceedings leading to the fine.

[574] *Béláné Nagy v. Hungary*, Grand Chamber judgment of 13 December 2016, no. 53080/13, § 113

such as preventing evictions where a tenant is in rent arrears, or allowing the deferral of mortgage repayments, are also likely to be deemed to serve the public interest.[575]

d. Proportionality

Compensation

As a general rule, a deprivation of possessions will not be deemed to strike a fair balance between A1P1 and the public interest unless compensation 'reasonably related' to the market value of the asset taken is paid to the person whose rights are interfered with.[576] The control of use of property may, but does not usually, require compensation and the question of whether it is justified will depend on a range of other factors, some of which are discussed below. The extent to which a generic interference with peaceful enjoyment requires compensation is more context-specific and will also depend on (amongst others) the factors discussed below.

States have already implemented a range of financial measures and schemes to compensate businesses for losses they may sustain as a result of measures adopted during the pandemic, some of which apply even in contexts likely to be deemed a control of use of property.[577] However, issues could arise if such compensation is not sufficient to prevent the closure of a business, does not reasonably relate to the market value of the possession lost, or where a person or business does not meet eligibility criteria for the compensation.

[575] The margin of appreciation granted to domestic authorities to determine what is in the public interest is particularly wide where measures are adopted in the context of a change of political and economic regime (*Valkov and Others v. Bulgaria*, judgment of 25 October 2011, nos.2033/04, 19125/04, 19475/04, 19490/04,19495/04, 19497/04, 24729/04, 171/05 and 2041/05, § 91; for example, in the context of austerity measures prompted by a major economic crisis: *Koufaki and Adedy v. Greece*, admissibility decision of 5 May 2013, nos. 57665/12 and 57657/12, §§ 37 and 39 (included as a summary in this publication))

[576] *Pincová and Pinc v. Czech Republic*, judgment of 5 November 2002, app. 36548/97

[577] See the subsidisations of employee salaries in various States including (Bosnia and Herzegovina, North Macedonia and Serbia) for the period of April and May: http://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-south-east-european-economies-c1aacb5a/ "COVID-19 crisis response in South East European economies" OECD Policy Responses to Coronavirus (COVID-19), 15 April 2020.

Context in which the measure is taken

In certain contexts, the Court affords a wider margin of appreciation to States to determine the most effective measures to take to serve the public interest. The Court is generally reluctant to question a State's decision to impose measures which interfere with A1P1 rights, where such measures are introduced to respond to an emergency situation,[578] or where measures are adopted as part of high-level decisions about the economy or the allocation of public resources.[579] The economic impact of responses to the Covid-19 pandemic was predicted to include the loss of jobs and income, as well as potentially the loss of pensions.[580] This may result from the closure of businesses due to lockdown measures, or the loss of public sector jobs if austerity measures were implemented. Based on existing case law, such high level decisions about the economy and allocation of public resources are unlikely to give rise to a successful claim under A1P1 for loss of income, in particular if a person is dismissed in line with the terms and conditions of their contract where cuts are made.

Disproportionate impact

Even where the subject-matter of a restriction otherwise attracts a wide margin of appreciation, measures should not impose an 'individual and excessive burden' on the affected persons, or 'single out' a particular group for adverse treatment.[581] For example, in a series of cases concerning Maltese rent control provisions, the Court found the relevant domestic provisions to be incompatible with A1P1 because they imposed a disproportionate burden on private landlords.[582] Issues

[578] *SA Bio d'Ardennes v. Belgium*, judgment of 12 November 2019, no. 44457/11

[579] See *Mamatas and Others v. Greece*, judgment of 21 July 2016, nos. 63066/14,64297/14 and 66106/14, where the Court dismissed a series of challenges to austerity measures imposed following the 2007/8 financial crisis

[580] See: http://documents1.worldbank.org/curated/en/236311590680555002/pdf/The-Economic-and-Social-Impact-of-COVID-19-Poverty-and-Household-Welfare.pdf "The Economic and Social Impact of COVID-19: Poverty and Household Welfare" World Bank Group Western Balkans Regular Economic Report No.17, Spring 2020

[581] See *Ásmundsson v. Iceland*, judgment of 12 October 2004, no. 60669/00, where the Court found a violation of A1P1 where alterations to the law governing disability pensions to resolve financial pressures on the scheme resulted in a small group of pensioners losing their entire entitlement. See also *Sporrong and Lönnroth v. Sweden*, plenary Court judgment of 18 December 1984, nos. 7151/75 and 7152/75 and *Hentrich v France*, judgment of 22 September 1994, no.13616/88

[582] *Cassar v. Malta*, judgment of 30 January 2018, no. 50570/13

may therefore arise if financial compensation or support schemes introduced in response to the economic effects of the pandemic arbitrarily exclude certain businesses or individuals[583] or, if they are deemed to impact a certain group more harshly than others.[584]

Duration

Permanent measures are more likely to be deemed disproportionate than temporary measures. In the context of a pandemic it is difficult to determine how long the measures will be in place, or whether measures which have been lifted will be reintroduced in response to further outbreaks. The longer measures are in place, the more important it becomes to ensure there are sufficient procedural safeguards for those subject to the measures to make representations regarding their individual circumstances and to request consideration of whether the restrictions remain necessary and proportionate in their particular situation.[585]

[583] For example, concerns were raised in the United Kingdom about the exclusion from financial aid programmes of freelance workers, those who had recently switched jobs, were newly self-employed or directors of limited companies: https://www.theguardian.com/business/2020/jul/23/rishi-sunak-urged-to-plug-gaps-in-covid-19-furlough-scheme-for-1m-self-employed-now "Rishi Sunak urged to plug furlough scheme gaps for 1m workers" by K. Makortoff and R.Partington, The Guardian, 23 July 2020.

[584] For example if a State permitted a freeze or deferral of rent payments, which impacted particularly harshly on landlords, where it could have adopted other, less intrusive measures, for example subsidising rent payments (as in Kosovo): http://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-south-east-european-economies-c1aacb5a/ "COVID-19 crisis response in South East European economies", OECD Policy Responses to Coronavirus (COVID-19), 15 April 2020. See also the judgment of the Czech Constitutional Court (Pl. ÚS 106/20 of 9 February 2021), which found that there was no justification for the decision to close certain businesses and not others. The Court found that the Government had prohibited all retail sales and provision of services and then, arbitrarily and with no justification as to their necessity and significance for controlling the spread of Covid-19, provided for numerous exemptions from this blanket ban, resulting in unequal treatment of different kinds of entrepreneurs.

[585] *AGOSI v. United Kingdom*, judgment of 24 October 1986, no. 9118/80

13. Article 14 and Article 1 of Protocol No. 12 – Freedom from discrimination

The principle of non-discrimination enshrined in Article 14 and Article 1 of Protocol No. 12 (A1P12) of the Convention prohibits differences in treatment of persons in analogous or relevantly similar situations,[586] as well as failures to treat differently persons whose situations are significantly different, where no objective and reasonable justification exists for such discriminatory treatment.[587] Article 14 protects against discrimination in the enjoyment of other Convention rights, and is relied upon in conjunction with other Convention rights, whereas A1P12 prohibits discrimination in the enjoyment of any right granted by the State, in the exercise of discretionary power, or any other act or omission of the State.

Whilst Article 14 and A1P12 are not listed as 'non-derogable' rights under the Convention, certain forms of discrimination can amount to degrading treatment proscribed by Article 3, which is a non-derogable provision.[588] Additionally, when assessing whether derogating measures are "strictly required" under Article 15 of the Convention[589] the Court examines whether the measures implemented to respond to a public emergency discriminate unjustifiably between different categories of persons.[590]

Responses to the Covid-19 pandemic, and failures to provide additional or tailored support to vulnerable groups as part of those responses, exacerbated existing inequalities and created new threats to the health and welfare of

[586] See *Biao v. Denmark*, Grand Chamber judgment of 24 May 2016, no. 38590/10, § 89

[587] See *Thlimmenos v. Greece*, Grand Chamber judgment of 6 May 2000, no. 34369/97, § 44

[588] For example, discrimination based on race could, in certain circumstances, amount to "degrading treatment" within the meaning of Article 3 (*East African Asians v. the United Kingdom*, admissibility decision of 6 March 1978, nos. 4715/70, 4783/71 and 4827/71; *Abdu v. Bulgaria*, judgment of 11 March 2014, no. 26827/08, § 23)

[589] See further Chapters III and IV of this publication.

[590] See *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 190 where the derogating measures were found to be disproportionate because they discriminated between nationals and non-nationals.

marginalised groups, including women, ethnic minorities, people with disabilities, older people and members of LGBTQI, migrant, and Roma communities.[591]

The potentially discriminatory impact of the restrictions on movement on those with disabilities, including confinement to one's home and restrictions on visits, was discussed in the section on Article 2 of Protocol No. 4 (Right to freedom of movement) within this publication and the discriminatory impact of closures of schools was discussed in the section on Article 2 of Protocol 1 –(Right to education). Some further examples of where issues may arise under Article 14 and A1P12 are discussed below, although these examples are not exhaustive.

a. Health

As discussed in the sections on Article 2 (Right to life), Article 3 (Protection from inhuman and degrading treatment) and Article 8 (Right to respect for private and family life) within this publication, States are under an obligation to implement and establish a framework of laws to protect life and prevent suffering, including to compel hospitals to adopt appropriate measures for the protection of the lives of patients and staff. Article 14 will be engaged if the regulations and measures that States introduce to respond to protect health in light of the Covid-19 pandemic have a discriminatory effect, either because they have a more severe impact on members of certain groups or because they do not take into account and sufficiently accommodate for the needs of and differences between different groups.[592]

[591] See https://rm.coe.int/cdadi-introductory-note-en-08042020-final-version/16809e201d "The anti-discrimination, diversity and inclusion dimensions of the response to COVID-19", Introductory Note of the Secretariat of the Steering Committee on Anti-discrimination, Diversity and Inclusion, 8 April 2020. See also: https://rm.coe.int/prems-126920-gbr-2530-cdadi-covid-19-web-a5-final-2774-9087-5906-1/1680a124aa - the Study prepared for the Council of Europe Steering Committee on Anti-Discrimination, Diversity And Inclusion (CDADI) by Stéphanie Cramer Marsal (lead author), Christian Ahlund and Robin Wilson, "COVID-19: an analysis of the anti-discrimination, diversity and inclusion dimensions in Council of Europe member States", November 2020.

[592] *Enver Şahin v. Turkey*, judgment of 30 January 2018, no. 23065/12, §§ 67-69; *Çam v. Turkey*, judgment of 23 February 2016, no. 51500/08, §§ 65-67 where the Court found an obligation to ensure "reasonable accommodation" to allow persons with disabilities the opportunity to fully realise their rights, and where a failure to do so amounted to discrimination.

People with disabilities and older people may be at greater risk from Covid-19 if they have a weaker immune system, suffer from health conditions which render them more vulnerable to the effects of Covid-19, or if the mobilisation of the health system towards tackling Covid-19 means they are not provided with the treatment or care they ordinarily have access to. They may also be reliant on either formal support by service providers or informal support by relatives and friends to purchase food, goods and medicine and to carry out daily activities such as bathing, cooking and eating.[593]

As discussed in the section Article 8 (Right to private life) of this publication, there are numerous respects in which States' vaccination policies might raise issues of discrimination. This includes where compulsory vaccination policies are enforced only against certain groups or members of certain occupations.[594] Additionally, making travel or access to public and private spaces dependent on vaccination status risks giving rise to discrimination on the basis of a person's immune status.

LGBTQI people regularly experience stigma and discrimination when seeking healthcare, leading to disparities in the quality and availability of healthcare for them.[595] Their health may already be compromised as a result of this, leaving them more vulnerable to the effects of Covid-19, or they may be less likely to engage with medical services if they suffer symptoms of Covid-19.[596] Further, a reprioritisation of required health services may mean that treatment of LGBTI

[593] See *Glor v. Switzerland*, judgment of 30 April 2009, no. 13444/04, § 80; *G.N. and Others v. Italy*, judgment of 1 December 2009, no. 43134/05, § 126; *Kiyutin v. Russia*, judgment of 10 March 2011, no. 2700/10 for confirmation that the scope of Article 14 of the Convention and Article 1 of Protocol No. 12 includes discrimination based on disability, medical conditions or genetic features.

[594] The case of *Thevenon v. France*, decision of 13 September 2022, no. 46061/21, concerned the question of whether the imposition of a compulsory vaccination on account of the applicant's occupation as a professional firefighter breached his rights under Articles 8 and 14. The case was, however, dismissed for failure to exhaust domestic remedies, so this substantive question was not considered.

[595] See https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf "COVID-19 and the Human Rights of LGBTI People", Document of the United Nations, 17 April 2020

[596] See https://blogs.worldbank.org/europeandcentralasia/closing-data-gap-lgbti-exclusion "Closing the data gap on LGBTI exclusion", L. Gelder, World Bank blogs, 26 May 2020. See also, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25889&LangID=E "'States must include LGBT community in COVID-19 response': The how and why from a UN expert" Victor Madrigal-Borloz, OHCHR, 17 May 2020

people is postponed or reduced, including hormonal treatment and gender reassignment surgery.[597]

Article 14 and A1P12 will only be breached if there is no objective and reasonable justification for differences in treatment, or failures to treat different situations differently. It may be necessary to reprioritise the healthcare services offered during the pandemic, but where this has a discriminatory impact on those with disabilities and LGBTQI people, States must be able to demonstrate that decisions to prioritise certain types of care over others were based on medical evidence and data, rather than prejudice or stigma. Similarly, where States apply a policy of compulsory vaccination to certain groups or members of certain occupations, they must be able to provide an objective and reasonable justification for why those groups, and not others, are subject to the vaccination duty. Further, States should be able to demonstrate that they balanced the aim of protecting the health and rights of people whose pre-pandemic medical care and treatment was reduced or postponed against the need to protect people from and prevent the spread of Covid-19.

A difference of treatment between persons with different "immune status", depending on their vaccination status, does not necessarily amount to unjustified discrimination. To avoid unjustified discrimination, policies restricting movement or assembly based on vaccination status should include exemptions for those who have not been vaccinated. For example, by permitting people to provide a negative Covid-19 test as an alternative to proof of vaccination status, or to provide evidence that, for medical or other reasons, they cannot be vaccinated.[598]

Where States issue general measures to protect the health of the nation from the spread of Covid-19, they are also required to take account of how those measures impact different communities differently and they may be under and obligation to take positive steps to ensure that such measures are effective in protecting the lives and health of people in different communities as effectively as those in others. Measures such as targeted information campaigns, delivered in different languages including sign language, should be implemented to ensure

[597] The Court recognised the right to undergo gender reassignment surgery under Article 8 in *YY v. Turkey*, judgment of 10 March 2015, no. 14793/08, where it found a breach of Article 8 when the applicant was denied for many years the possibility of undergoing such an operation.

[598] https://rm.coe.int/dh-bio-2021-7-final-statement-vaccines-e/1680a259dd "Statement on Human Rights Considerations Relevant to "Vaccine Pass" and Similar Documents", Council of Europe Committee on Bioethics (DH-BIO), 4 May 2021

messages about protecting health are delivered to those who need to hear them most. States could also consider if it is appropriate to include an exemption to the general restrictions on visits to elderly, and/or vulnerable people to allow for their carers to carry out duties essential for their health and well-being. If such exemptions are made, they should also provide sufficient protective equipment to carers to enable this to happen.

Regulations instructing people to 'stay at home', to wash their hands, possessions, and houses more regularly and to stay distanced from other people may help to protect a proportion of the population. However, such measures will not assist those living in cramped conditions, without access to hygiene products. For example, a significant percentage of Roma people live in households with no tap water, without sanitary facilities and in cramped, or overcrowded conditions which make physical distancing almost impossible.[599] States should consider implementing extra measures to protect the lives and health of such communities, for example by permitting Roma and Traveller communities to reside in larger areas or opening new sites for them to use to increase social distancing, helping to install sanitary facilities on such sites, increasing access to emergency accommodation for homeless people and providing hygiene products to those without access.[600]

A refusal to provide emergency assistance to a person, because they are not a national of the State in which they require such assistance can also constitute discrimination on the basis of nationality.[601] States may therefore be under an obligation to render their healthcare systems more accessible to those without residence status in their country, in particular if travel restrictions are in place which prevent people from travelling to the country of which they are a national to seek treatment.[602]

[599] See https://ec.europa.eu/info/sites/info/files/overview_of_covid19_and_roma_-_impact_-_measures_-_priorities_for_funding_-_23_04_2020.docx.pdf "Overview of the impact of coronavirus measures on the marginalised Roma communities in the EU", Report by the European Commission, 6 May 2020

[600] See https://www.coe.int/en/web/interculturalcities/covid-19-special-page#{%2262433518%22:[3]} "Intercultural Cities: COVID-19 Special page", the Council of Europe, where examples include that of Switzerland which called upon cantons and municipalities to open provisional sites for Roma and Travellers in sports centre car parks in order to reduce occupancy levels and increase social distancing, to suspend parking fees to relieve financial pressures, and to improve sanitary installations ensuring running water and liquid soap for frequent hand washing.

[601] *Gaygusuz v. Austria*, judgment of 16 September 1996, no. 17371/90

[602] The Portuguese Government, for example, decided that all immigrants with residence permit applications that were pending on 18 March 2020 would receive permission for temporary residence and have access to the same

b. Domestic Abuse

The sections on Article 2 (Right to life), Article 3 (Protection from inhuman and degrading treatment) and Article 8 (Right to respect for private and family life) within this publication describe the positive obligations on States under Articles 2, 3 and 8 in respect of domestic abuse. This includes obligations to set up a legislative framework aimed at preventing and punishing domestic abuse and to actively afford protection to victims and punish those responsible for domestic abuse through that framework. These obligations are often interpreted in conjunction with Article 14, given the disproportionate effect of domestic abuse on women and children.

The Court has explicitly considered domestic violence to be a form of gender-based violence, which in turn is a form of discrimination against women. A failure to protect women against domestic violence may breach their right to equal protection of the law, even where the failure is not intentional.[603] States are under a positive obligation to establish and apply effectively a system which punishes all forms of domestic violence in a manner which recognises the severity of the injuries caused and which provides sufficient safeguards for victims.[604] Even where the requisite legal framework is in place, discrimination can also result from the general attitude of the local authorities, such as the manner in which women were treated at police stations when they reported incidents of domestic violence and judicial passivity in providing effective protection to victims.[605]

The Istanbul Convention is also relevant in this respect and its Chapter IV sets out in detail the obligations of State Parties to take measures to prevent all forms of discrimination against women and children, including through legislation and investigation.

In light of these positive obligations, States should ensure that authorities, including the police and courts, continue to define and treat incidents of domestic

rights as all other citizens, including social support: https://ec.europa.eu/migrant-integration/news/portuguese-government-gives-temporary-residence-to-immigrants-with-pending-applications "Portuguese government gives temporary residence to immigrants with pending applications", A. Esteves, European Commission website on Integration, 28 March 2020.

[603] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §§ 184-191 (included as a summary in this publication)

[604] *Volodina v. Russia*, judgment of 9 July 2019, no. 41261/17

[605] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, § 192 (included as a summary in this publication)

abuse as urgent cases which should be prioritised and towards which resources should be diverted even amidst the pandemic. States should also seek to adopt measures to ensure that shelters and support services can continue to run to the maximum extent possible without compromising the health and safety requirements of the pandemic.[606] Given the discriminatory impact on women and children and the harm it can cause to their mental and physical health, a complete closure of services is unlikely to be a proportionate means of pursuing the aim of protecting health by preventing the spread of Covid-19.

Restrictions on movement also mean many LGBTQI youths have been confined to live in hostile environments with unsupportive family members or co-habitants, which can increase their exposure to violence, as well as cause or exacerbate anxiety and depression.[607] Measures taken to keep shelters open and to ensure that support services can continue to operate safely should therefore also be extended to members of the LGBTQI community.

c. Enforcement of restrictions on movement and assembly

The ways in which restrictions on movement and assembly have been enforced have also given rise to situations of discrimination.[608] There are concerns that Roma people living in informal settlements, and refugees, asylum-seekers and migrants living in camps have been subjected to disproportionate and discriminatory implementation of the measures in response to Covid-19, for example the imposition of militarised and mandatory quarantine measures, which were not imposed on the rest of the population and which were heavily policed, including by the armed forces.[609] Disproportionate restrictions on freedom of

[606] See https://eca.unwomen.org/en/news/stories/2020/4/albania-adopts-new-protocol-to-ensure-undisrupted-shelter-services "Albania adopts new protocol to ensure undisrupted shelter services", UN Women news, 21 April 2020

[607] See https://www.ohchr.org/Documents/Issues/LGBT/LGBTIpeople.pdf ""COVID-19 and the Human Rights of LGBTI People", Document of the United Nations, 17 April 2020

[608] https://www.aljazeera.com/indepth/opinion/police-covid-19-pandemic-excuse-abuse-roma-200511134616420.html "Police Are Using the COVID-19 Pandemic as an Excuse to Abuse Roma" Joanathan Lee, Al Jazeera, 14 May 2020

[609] See https://www.amnesty.org/download/Documents/EUR0125112020ENGLISH.PDF "Policing the Pandemic: Human Rights Violations in the Enforcement of COVID-19 Measures in Europe", Report of Amnesty International, 24 June 2020; see also the section on Article 3 (Protection from inhuman and degrading treatment) within this publication.

movement that selectively target Roma, refugees and migrants, in particular where such restrictions are policed by a military presence, without evidence that these groups represent an objective threat to public health or security, imposes an unnecessary and disproportionate burden on such groups and amounts to discrimination.[610]

There are also concerns that the broad new powers granted to the police to enforce regulations on movement and assembly have led to discriminatory practices in how Covid-19 related regulations have been policed, particularly as the exact scope of these regulations has not always been clear. In countries which collect disaggregated data on law enforcement practices, there is evidence of an increase in stop and search practices and police checks against black, Asian and ethnic minority people, who are also recorded as more likely to receive fines and other penalties for breach of the Covid-19 related regulations.[611] Actions of the police, such as stop and search, fall within the scope of Article 8 and will be unlawful unless there are sufficient safeguards to constrain the discretion of police officers exercising searches.[612] Automatically connecting race or ethnicity to criminal behaviour and making decisions to conduct any kind of police intervention with a person's behaviour based on ethnic or racial profiling, is discriminatory and unlawful.[613] States must therefore seek to ensure that any new offences introduced under Covid-19 regulations are defined as clearly as possible and that there are sufficient safeguards against the misuse of police discretion in enforcing these regulations.

[610] *A and Others v. United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05 (included as a summary in this publication)

[611] See https://www.bbc.co.uk/news/uk-53556514 "Coronavirus: Young ethnic minority men 'more likely to get Covid fines'", BBC news, 27 July 2020; https://www.amnesty.org/download/Documents/EUR0125112020ENGLISH.PDF "Policing the Pandemic: Human Rights Violations in the Enforcement of COVID-19 Measures in Europe", Report of Amnesty International, 24 June 2020; https://www.met.police.uk/sd/stats-and-data/met/stop-and-search-dashboard "Stop and search dashboard", The Metropolitan Police, July 2020; http://www.leparisien.fr/seine-saint-denis-93/coronavirus-en-seine-saint-denis-un-nombre-record-d-amendes-police-et-justice-durcissentle-ton-19-03-2020-8284008 "Coronavirus en Seine-Saint-Denis : un nombre record d'amendes, police et justice durcissent le ton", N. Revenu, Le Parisien news, 19 March 2020; https://www.lexpress.fr/actualite/societe/selon-le-prefet-de-seine-saint-denis-le-confinement-est-globalement-bienrespecte_2122683.html "Selon le préfet de Seine-Saint-Denis, le confinement est "globalement bien respecté", L'EXPRESS news, 1 April 2020.

[612] *Gillan and Quinton v. United Kingdom*, judgment of 12 January 2010, no. 4158/05

[613] *Lingurar v. Romania*, judgment of 16 April 2019, no. 48474/14

Chapter II – Derogations

1. Background

Similar to other international human rights treaties,[614] the Convention affords the Contracting States the possibility of derogating from their obligations to secure certain Convention rights and freedoms, in certain very specific and limited situations. Such possibility to derogate is provided by Article 15 of the ECHR. This Article provides:

> *1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*
>
> *2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*
>
> *3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*

Chapter I of this publication discusses the situations in which States may have been permitted to interfere with certain Convention rights to respond to the Covid-19 pandemic. For example, the permitted restrictions in the second

[614] See Article 5 of the International Covenant on Civil and Political Rights (the ICCPR), (1976) 999 UNTS 171; Article 27 of the American Convention on Human Rights (1978), UNTS, 123; Article F § 1 of the European Social Charter ETS 163

paragraphs of Articles 8 to 11, which allow for interferences with these rights where such interferences pursue a legitimate aim (such as the protection of health) and comply with the principles of legality and proportionality. The nature and purpose of derogation under Article 15 of the Convention is different from the purpose of restrictions provided, for example, by the second paragraphs of Articles 8 to 11 of the Convention and also from the purpose of the restrictions provided in Article 16 and 17 of the ECHR.

Article 15 means a disapplication of certain rights protected by the Convention in specific circumstances, whereas permitted interferences specifically set out in several articles of the ECHR are part of the daily application and implementation of these rights. Article 15 operates only temporarily in limited circumstances and not in relation to specific individuals, whereas interferences and limitations to rights apply commonly also in relation to specific individuals. According to the International Court of Justice, derogation as a concept has the effect of ceasing the protection offered by international human rights law.[615] The invocation of Article 15 should therefore only be considered where a State has concluded that the exigencies of an emergency situation make it impossible to protect rights within the framework provided for by the permitted exceptions.

The present-day, principal international human rights instruments each contain an emergency derogation clause,[616] seemingly in acceptance that public emergency situations, the security of the State and its democratic institutions, and the safety of its population, are vital interests that deserve protection and may require a temporary derogation from certain human rights to allow States to implement exceptional measures to seek to protect such interests.[617] Indeed,

[615] This is the interpretation given by the ICJ to the derogation foreseen in Article 4 ICCPR. See ICJ Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, judgment of 9 July 2004, I.C.J. Reports 2004, p. 178, § 106, and ICJ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda)*, judgment of 19 December 2005, I.C.J. Reports 2005, § 216. The Grand Chamber of the ECHR has accepted that the derogation foreseen by Article 15 of the ECHR is similar to the derogation foreseen by Article 4 ICCPR: *Hassan v. the United Kingdom*, Grand Chamber judgment of 16 September 2014, no. 29750/09, § 41

[616] ECHR, Article 15 allows derogation in cases of "war or other public emergency threatening the life of the nation"; ICCPR, Article 4 refers to a "public emergency which threatens the life of the nation", while the American Convention on Human Rights (ACHR, Article 27) refers to a "war, public danger, or other public emergency that threatens the independence or security of a State party"

[617] https://rm.coe.int/16809e38a6: The "Compilation of Venice Commission Opinions and Reports on States of

the Secretary General of the Council of Europe views the possibility for States to derogate from the Convention as an important feature of the system, permitting the continued application of the Convention and its supervisory machinery even in the most critical times.[618] However, as highlighted by the Venice Commission, derogations from fundamental human rights are an especially crucial problem since experience has shown that the gravest violations of human rights tend to occur in the context of states of emergency. Emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general.[619] Strict limits on the duration, circumstance and scope of such powers are therefore essential. The operation of derogations under Article 15 ECHR and the limits on its use, will be briefly analysed in section 2 below.

Prior to the outbreak of the Covid-19 pandemic, nine States had relied on their right of derogation under Article 15, on 35 occasions.[620] Between March and April 2020, the pandemic resulted in ten new derogations.[621] The majority of the Covid-19-related derogations lasted between two to six months,[622] and nine out

Emergency", European Commission for Democracy Through Law (Venice Commission) Strasbourg, 16 April 2020, CDL-PI(2020)003

[618] Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states, SG/Inf(2020)11, 7 April 2020

[619] https://rm.coe.int/16809e38a6: The "Compilation of Venice Commission Opinions and Reports on States of Emergency", European Commission for Democracy Through Law (Venice Commission) Strasbourg, 16 April 2020, CDL-PI(2020)003

[620] Prior to the outbreak of the Covid-19 pandemic, Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, Ukraine and the United Kingdom had declared a derogation under Article 15 in other circumstances. See the compilation of data derived from the Council of Europe records between 5 May 1949 and 18 May 2020 on every derogation ever made under the Convention: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020; See also https://www.academia.edu/42294162/Derogations_from_the_European_Convention_on_Human_Rights_The_Case_for_Reform, "Derogations from the European Convention on Human Rights – The Case for Reform", S. Wallace, academia.edu.

[621] The States that derogated from the ECHR in response to the pandemic were: Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino and Serbia. See https://www.coe.int/en/web/conventions/derogations-COVID-19: "Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic", Council of Europe Treaty Office, status as of 3 January 2022

[622] States derogated during the following periods: Albania from March to June 2020 (three months), Armenia from

of ten States withdrew their derogation between May to September 2020. Latvia and the Republic of Moldova were the only two States to reintroduce derogations in response to the continued impact of the Covid-19 pandemic in 2021.[623]

Georgia first derogated from the Convention on 23 March 2020 and has not yet withdrawn its derogation, making it the only State whose derogation in response to the pandemic remains in force at the time of writing. On 3 January 2022, Georgia notified the Secretary General of the Council of Europe that it intends to continue the derogation until 1 January 2023, stating that the global and the local threat of Covid-19 remains significant, meaning that the Parliament of Georgia adopted the prolongation of special emergency legislation until 1 January 2023.[624]

March to September 2020 (six months), Estonia from March to May 2020 (two months), Latvia from March to June 2020 (three months), again from December 2020 to April 2021 (four months) and again from October to November 2021 (one month), North Macedonia from April to June 2020 (almost three months), the Republic of Moldova from March to May 2020 (two months) and again in April 2021 (less than one month), Romania from March to May 2020 (two months), San Marino from April to July 2020 (three months) and Serbia from April to October 2020 (6 months).

[623] https://www.coe.int/en/web/conventions/derogations-COVID-19: "Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic", Council of Europe Treaty Office, status as of 3 January 2022

[624] Notification - JJ9303C Tr./005-285, 3 January 2022, Notification of Communication by Georgia: https://rm.coe.int/1680a4fdb0

2. How does the ECHR operate in cases of derogation?

a. Substantial criteria

Article 15 § 1 delineates three substantial criteria for a derogation to be Convention compliant.[625]

i) Time of war or other public emergency threatening the life of the nation

The right of derogation can be invoked only in two distinct categories of situations: in response to a "time of war" or in response to an "other public emergency".

"Time of war"

Derogations prompted by a situation of war, in the sense of international or internal armed conflict or military aggression by another State,[626] have been presented by Ukraine, Armenia, Azerbaijan and the Republic of Moldova. The first such derogation followed the events in Crimea and Eastern Ukraine in 2014.[627] In their Note Verbale the Ukrainian Government referred to "armed aggression," "annexation" and "occupation."[628] In March 2022, Ukraine again notified the

[625] The "Compilation of Venice Commission Opinions and Reports on States of Emergency", European Commission for Democracy Through Law (Venice Commission) Strasbourg, 16 April 2020, CDL-PI(2020)003, contains a compilation of extracts from reports/studies adopted by the Venice Commission regarding states of emergency and the requirements for lawfulness in this area.

[626] *Hassan v. the United Kingdom*, Grand Chamber judgment of 16 September 2014, no. 29750/09, §§ 40-41

[627] See https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354; "Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic", Council of Europe Treaty Office, 29 June 2020. In particular, the Declarations in the Notes Verbales from the Permanent Representation of Ukraine, dated 5 June 2015, 3 November 2015, and 31 January 2017.

[628] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, § 1-3 of the Note Verbale from the Permanent Representation of Ukraine, dated 5 June 2015

Secretary General of the Council of Europe of its intention to derogate from the Convention, in response to the "military aggression of the Russian Federation against Ukraine" and following the imposition of martial law in Ukraine.[629] In their Note Verbale, the Ukrainian government stated that the situation required a derogation from Articles 8, 9, 10, 11, 14 and A1P1, A2P1 and A2P4. Martial law, and the derogation by Ukraine, have subsequently been extended by consecutive periods of 90 days, and remain in place at the time of writing.[630]

The Republic of Moldova also derogated from the ECHR in March 2022, citing "major national security threats in the immediate vicinity of the land border between the Republic of Moldova and Ukraine, as a result of the beginning of massive military actions on the territory of Ukraine on 24 February 2022." In its Note Verbale, the Republic of Moldova states that measures already in force, or envisaged, may entail restrictions such as (amongst other things): establishing a special regime for entry in and exit out of the country; expelling from its territory people whose presence may affect public order and security; prohibition on holding rallies, public demonstrations and other mass actions; and coordination of the activity of mass media / the introduction of special rules for the use of telecommunications, the fight against misinformation, fake news and hate speech.[631]

Both Armenia and Azerbaijan derogated from the ECHR in relation to the outbreak of armed conflict in Nagorno-Karabakh in September 2020. Armenia's derogation was in place between September 2020 and April 2021. Its Note Verbale stated that emergency measures were required to respond to a large-scale airborne, missile and land attack by Azerbaijani forces, which meant that there was an imminent threat of invasion of its territory threatening its sovereignty, security and territorial integrity, as well as the life and safety of peaceful citizens.[632] Azerbaijan's derogation was in place between September 2020

[629] https://rm.coe.int/0900001680a5b0b0: Notification JJ9325C Tr./005-287, 2 March 2022

[630] At the time of writing, the most recent communication was on 12 September 2022, where Ukraine notified the Council of Europe of the extension of Martial Law from 23 August 2022 for a period of 90 days: https://rm.coe.int/0900001680a8076b: Notification JJ9398C Tr./005-298, 12 September 2022

[631] See the Note verbale No. FRA-CoE/352/96 from the Permanent Representation of Moldova to the Council of Europe, dated 3 March 2022, registered at the Secretariat General on 3 March 2022. The derogation was most recently renewed on 5 August 2022. At the time of writing, the state of emergency and the derogation have been extended three times and prolonged until 6 October 2022.

[632] See the Note verbale No. 3201/C-308/2020 from the Permanent Representation of the Republic of Armenia, dated 29 September 2020, registered at the Secretariat General on 29 September 2020, in which Armenia

to December 2020 in response to an "act of aggression" by Armenia, to "repel military aggression", "ensure the security of civilians" and enable the Azerbaijani armed forces to undertake counter-offensive measures, whilst martial law and a curfew from 9pm to 6am were introduced.[633]

It should be noted that the Court has not assessed whether any of the above derogations constituted a valid derogation under Article 15.

"Other public emergency"

All other situations in relation to which an Article 15 derogation has been used by the Contracting States concern an "*other public emergency*." Situations which have previously been deemed to constitute a 'public emergency' and which have been held to justify derogations under Article 15 include: the threat to security posed by the activities of the IRA (the Irish Republic Army) in Northern Ireland,[634] the armed riots in Noumea, New Caledonia in 1985,[635] the armed uprising in Albania in 1997,[636] the threat of serious terrorist attacks in the United Kingdom following the attacks in the United States on 11 September 2001,[637] PKK terrorist

notified the Council of Europe of temporary derogations from its obligations under Articles 8, 10 and 11 of the Convention, Article 1, Protocol 1 of the Convention and Article 2, Protocol 4 of the Convention.

[633] See the Note verbale No. 5/11-3283/01/20 from the Ministry of Foreign Affairs of Azerbaijan, dated 28 September 2020, registered at the Secretariat General on 28 September 2020, in which the Republic of Azerbaijan exercises its right of derogation from its obligations under Articles 5, 6, 8, 10 and 11, Article 1 and 2 of the Protocol to the Convention, and A2P4.

[634] *Ireland v United Kingdom*, judgment of 18 January 1978, no. 5310/71; See also the United Kingdom's Notices of Derogation dated 20 August 1971, 23 January 1973 and 16 August 1973, Yearbook of the Convention, volume 14, page 32 and volume 16, pages 24, 26 and 28, respectively.

[635] See letter from the Chargé d'affaires a.i. of France, dated 7 February 1985.

[636] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA-605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, the Note Verbale from the Ministry for Foreign Affairs of Albania, dated 26 July 1997.

[637] *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 181; See also https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA-605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, the Note Verbale from the Permanent Representation of the United Kingdom dated 18 December 2001

activity in south-East Turkey,[638] the terrorist attacks in France in 2015[639] and the attempted military coup in Turkey in 2016.[640] Between 2021 and 2022, the Republic of Moldova derogated from the ECHR (including its obligations to protect freedom of expression under Article 10) on two occasions in response to the "grave energy crisis" in its territory, which (in its view) might require rationing of natural gas consumption throughout the country and coordinating the work of the media.[641] The Court has not delivered a judgment on whether the energy crisis constituted a 'public emergency' within the meaning of Article 15.

"Threatening the life of the nation"

Even where a situation is deemed to constitute a "*war or other public emergency*," to be able to justify a derogation under Article 15 § 1, it must also "*threaten the life of the nation*."

Historically, the Court interpreted this to mean "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[642] More recently, it has become clear that an "emergency" may affect only a particular region of a

[638] *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93, § 70; See also See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, the Note Verbale from the Permanent Representation of the Republic of Turkey, dated 24 July 2016

[639] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA-605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, the letter from the Permanent Representative of France to the Council of Europe, dated 24 November 2015

[640] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA-605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, the Declaration in the Note Verbale from the Permanent Representative of the Republic of Turkey dated 21 July 2016

[641] Derogations contained in the Note verbale No. FRA-CoE/352/536 of the Permanent Representation of Moldova, dated 3 November 2021, registered at the Secretariat General on 3 November 2021 and in the Note verbale No. FRA-CoE/352/81 from the Permanent Representation of Moldova to the Council of Europe, dated 25 February 2022, registered at the Secretariat General on 25 February 2022.

[642] *Lawless v Ireland (No. 3)*, judgment of 1 July 1961, no. 332/57, § 28

nation, rather than the nation as a whole.[643] However, where a derogation is declared only in respect of a particular region within a State, the legal effects of that derogation are strictly limited to the territorial scope indicated in the notification to the Secretary General. Neither the State, nor the Court, can extend the effects of a derogation to parts of a State not mentioned in the derogation.[644]

The emergency should be actual or imminent but does not necessarily need to be temporary. It is possible for a public emergency within the meaning of Article 15 to continue for several years. The Government of the United Kingdom, for example, sent six derogation notices concerning the exercise of extrajudicial powers of arrest, detention and internment in Northern Ireland from 1971 to 1975 and the Court accepted that the threat to security threat posed by the IRA constituted a public emergency threatening the life of the nation throughout this time.[645] Further, the requirement of imminence does not necessarily require a State to wait for disaster to strike before taking measures to deal with it, a derogation may be invoked to adopt preventative measures.[646] From the examples mentioned above it seems clear that situations such as terrorist threats or attacks,[647] armed riots, or coup d'États[648] are accepted by the Court to be public emergency situations which justify the use of a derogation under Article 15. However, demonstrations consisting of large crowds of several thousand

[643] For example, France's derogation on 7 February 1985 in relation to the armed riots in Noumea, New Caledonia.

[644] *Barseghyan v. Armenia*, judgment of 21 December 2021, no. 17804/09, where the Court rejected the Armenian Government's argument that the applicant's complaint about his arrest and detention in the city of Gyumri fell within the scope of the state of emergency and derogation that had been declared in Yerevan.

[645] See *Ireland v United Kingdom*, judgment of 18 January 1978, no. 5310/71; *Brannigan and McBride v. United Kingdom*, judgment of 26 May 1993, nos. 14553/89 and 14554/89; *Marshall v. United Kingdom*, admissibility decision of 10 July 2001, no. 41571/98; and more recently *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 178. See also Macdonald R. St. J., "Derogation under Article 15 of the European Convention of Human Rights", in Columbia Journal of International Law, 36, 1998, pp. 241-242; See also https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=dA605sOe "Reservations and Declarations for Treaty No. 005 – Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe Treaty Office, 10 September 2020. In particular, the withdrawal of the derogation contained in a letter from the Permanent Representation of the United Kingdom, dated 5 May 2006

[646] *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 177

[647] See *Brannigan and McBride v. United Kingdom*, judgment of 26 May 1993, nos. 14553/89 and 14554/89, § 48; *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 181

[648] See *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 13237/17, §§ 91-93; Şahin Alpay v. Turkey, judgment of 20 March 2018, no. 16538/17, §§ 75-77

people which are predominantly peaceful do not constitute a public emergency "threatening the life of the nation". Where such demonstrations involve violence committed by small groups of protestors this might constitute a "serious public order situation" but does not justify a derogation under Article 15.[649]

The crisis or danger must also be such that the normal measures or restrictions permitted by the Convention (such as for the maintenance of public safety, health and order under Articles 8-11 of the Convention) are plainly inadequate.[650] Chapter I of this publication discusses the situations in which States may be permitted to interfere with certain rights, in the context of responding to the pandemic, and the conditions for doing so under Articles 8-11. It also discusses ways in which to ensure compliance with the other Articles of the Convention. No examples arose in Chapter I where it was deemed impossible for a State to respond to the pandemic within the existing framework of the Convention. It therefore remains unclear if and under what circumstances the Covid-19 pandemic would meet this particular pre-condition to the invocation of Article 15. The Court has not, at the time of writing, addressed this question directly.[651] It is, however, analysed in more detail in section (c) below.

ii) Extent strictly required by the exigencies of the situation

States are permitted to derogate from their obligations to secure the protection of Convention rights only to the extent strictly required by the situation. This implies a requirement of proportionality between the emergency situation and the measures taken in response.[652] Even in a state of emergency, States remain under an obligation to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.[653]

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[649] *Dareskizb Ltd v. Armenia*, judgment of 21 September 2021, no. 61737/08, §§ 61 - 63

[650] See *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "Greek case"), judgment of 24 January 1968, nos. 3321/67, 3322/67, 3323/67 and 3344/67, Report of the Commission, § 153

[651] In *Terheş v. Romania*, decision of 13 April 2021, no. 49933/20, §46 (included as a summary in this publication) the Court found that it was unnecessary to examine the validity of the derogation introduced by the Romanian government during the Covid-19 pandemic. The Romanian government had derogated from the ECHR in respect of A2P4 (the right to freedom of movement). However, the complaint was brought in respect of a breach of Article 5, which was found not to be engaged. The applicant did not invoke their A2P4 rights.

[652] https://rm.coe.int/0900001680a8311e "Draft CDDH report on member States' practice in relation to derogations from the European Convention on Human Rights in situations of crisis", Steering Committee for Human Rights (CDDH), 29 September 2022

[653] *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 13237/17, § 210; Şahin Alpay v. Turkey, judgment

A range of factors are relevant to the Court's decision on whether a State has gone beyond what is strictly required by an emergency situation, for example the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.[654] The Court also takes account of whether the measures are a genuine response to the emergency situation, whether they were used for the purpose for which they were granted, whether the derogation is limited in scope, whether the need for the derogation was kept under review, whether the measures were subject to strict safeguards, the proportionality of the measures, whether they were discriminatory and whether the measures were introduced in a procedure in accordance with law and subjected to effective judicial and parliamentary control and review.[655] For example, even where the Court accepts the existence of a public emergency threatening the life of the nation, derogating measures that discriminate unjustifiably between nationals and non-nationals and which are therefore disproportionate, will be deemed to go beyond what is strictly required by the exigencies of the situation.[656]

Article 15 § 1 does not oblige States to make a derogation. The term "may" used in this paragraph means that States are to evaluate themselves whether a derogation is required in the specific emergency situations with which they are faced. The Court has generally afforded a wide margin of appreciation to States to determine if the life of their nation is at stake and has judged governments better placed than an international court to decide both: i) if an emergency exists; and ii) the scope of the derogations necessary to avoid or mitigate the effects of such emergency.[657]

of 20 March 2018, no. 16538/17, § 180

[654] *Brannigan and McBride v. United Kingdom*, judgment of 26 May 1993, nos. 14553/89 and 14554/89, § 43; *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 173

[655] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e: The Venice Commission, Report - Respect for democracy, human rights and the rule of law during states of emergency, reflections 19 June 2020 sets out numerous principles governing the declaration of a state of emergency, including necessity, proportionality, temporariness, effective parliamentary and judicial scrutiny and predictability of emergency legislation. See also the UN Human Rights Committee, Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, 30 April 2020, https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf

[656] *A. and others v. United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, §190

[657] *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93

This discretion is not, however, unlimited. To date, the Court has, on three occasions, determined that a derogation was invalid.[658] The Court is not requested to determine the validity of every derogation. However, the Court can be called upon to scrutinise: States' decisions to derogate in specific circumstances; their choice of the measures taken during a period of derogation; and the extent to which those measures are strictly required by the exigencies of the crisis. Additionally, in making a derogation States must respect the criteria mentioned below as to the impossibility to derogate from absolute rights and the respect for other obligations under international law.

iii) Consistency with other obligations under international law

Derogations from the ECHR should also comply with a Contracting State's other obligations under international law, a formulation which is also found in Article 4 ICCPR.[659] Thus, when derogating from rights which are contained within both the ICCPR and the ECHR, it would be necessary to comply with the different formalities regarding derogation set out in both instruments.[660]

iv) Impossible derogations

Article 15 § 2 provides that no derogation can be validly made, in whatever situation, to the rights guaranteed by Articles 2, 3, 4 § 1 and 7 of the ECHR. It is also impossible to derogate from the abolition of the death penalty, provided by

[658] *Greece v. United Kingdom*, no. 3321/67, in which the Commission found that there was no 'public emergency threatening the life of the nation'; *A. and others v. United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, where the derogation was invalid because the relevant measures were found to be unjustifiably discriminatory and disproportionate; and *Dareskizb Ltd v. Armenia*, judgment of 21 September 2021, no. 61737/08, where the Court found that the relevant situation did not constitute a public emergency threatening the life of the nation.

[659] Article 4 ICCPR provides that "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed ..."

[660] *Brannigan and McBride v. United Kingdom*, judgment of 26 May 1993, nos. 14553/89 and 14554/89, §§ 67-73, where the Court considered if the United Kingdom government's failure to issue an official proclamation meant that its derogation from the ICCPR was not consistent with its obligations under international law. The Court found that it was not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in Article 4 ICCPR, but nonetheless concluded that the statement made by the Home Secretary in parliament was sufficient to mean that the UK Government acted in accordance with Article 4 ICCPR, and that it had therefore acted consistently with its obligations under international law.

Protocols 6 and 13 to the Convention.[661] The exigencies of a public emergency provide no exception to this rule.[662]

b. Procedural criteria

In terms of procedural safeguards, Article 15 § 3 contains an obligation to notify and keep the Secretary General fully informed of the measures taken, the reasons for them, and the point at which they end. Article 15 § 3 also requires permanent review of the need for emergency measures to be in place.[663]

Notification to the Secretary General must include sufficient information to enable the other States and the Court to appreciate the nature and extent of the derogation. In the absence of an official and public notice of derogation, Article 15 does not apply, and the Convention applies in full to any measures taken by the State.[664] The derogating State is not explicitly required to indicate the specific Articles of the Convention that will be impacted by the derogation.[665] However, States often choose to do so and the position of the Secretary General is that it is preferable that States, for reasons of legal certainty, specify precisely which provisions they intend to derogate from.[666]

The Secretary General engages with States in relation to emergency measures and has begun to play an increasingly active role scrutinising the justifications for a derogation under Article 15. For example, during the Albanian civil unrest in 1997, he requested further justification of the Albanian Government's emergency

[661] See Article 3 of Protocol 6 and Article 2 of Protocol 13 both providing in identical terms that: "*No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.*"

[662] See *Öcalan v. Turkey* (No. 2), judgment of 18 March 2014, nos. 24069/03, 197/04, 6201/06 and 10464/07, §§ 97-98; *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04, § 283

[663] *Brannigan and McBride v. United Kingdom*, judgment of 26 May 1993, nos. 14553/89 and 14554/89, § 54

[664] *Cyprus v. Turkey*, Report of the Commission of 4 October 1983, no. 8007/77, §§ 66-68

[665] *Ahmet Hüsrev Altan v. Turkey*, judgment of 13 April 2021, no. 13252/17, where the notice of derogation by Turkey did not explicitly mention which Articles were subject to the derogation, instead it announced that "measures taken may involve derogation from the obligations under the Convention" and the Court was prepared to accept that the formal requirements of the derogation were satisfied.

[666] https://rm.coe.int/0900001680a8311e "Draft CDDH report on member States' practice in relation to derogations from the European Convention on Human Rights in situations of crisis", Steering Committee for Human Rights (CDDH), 29 September 2022, § 23

measures and in 2005, he did not accept France's notification of the state of emergency which was declared during the riots in Paris as a notification of derogation.[667]

PACE Resolution 2209 (2018) recommended that the Secretary General act as an advisory body before and during derogations to "provide advice to any State Party considering the possibility of derogating on whether derogation is necessary and, if so, how to limit strictly its scope."[668] This new layer of non-judicial supervision became increasingly relevant as States grappled with the extent to which their measures in response to the Covid-19 pandemic could permissibly interfere with human rights. For example, in March 2020, the Secretary General wrote to the Prime Minister of Hungary warning that the legislation introduced in response to the Covid-19 pandemic would jeopardise democratic principles and human rights.[669] The Secretary General also published a toolkit for States on respecting democracy, rule of law and human rights in the during the pandemic, which included a section on Convention compliant derogation in times of emergency.[670]

c. To derogate or not to derogate during the Covid-19 pandemic situation?

Between March and April 2020, 10 States notified the Council of Europe of their intention to derogate from their obligations under the ECHR to respond to the pandemic.[671] This represented an unprecedented number of concurrent

[667] See https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24505&lang=en "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights", R. Comte, Report of the Parliamentary Assembly, Committee on Legal Affairs and Human Rights, 27 February 2018

[668] See https://pace.coe.int/en/files/24505 "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights", Resolution 2209 (2018), Parliamentary Assembly, 24 April 2018

[669] See https://rm.coe.int/orban-pm-hungary-24-03-2020/16809d5f04 Letter of the Secretary General to the Prime Minister of Hungary, 24 March 2020

[670] Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, A toolkit for member states, SG/Inf(2020)11, 7 April 2020

[671] The Contracting States that have used this possibility until 13 August 2020 are: Albania, Armenia, Estonia, Georgia, Latvia, North Macedonia, Moldova, Romania, San Marino and Serbia. See https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354 "Notifications under Article 15 of the Convention in

derogations and sparked debate regarding whether the Covid-19 pandemic justifies a derogation under Article 15.[672] Numerous other States have reported that they considered derogating from their obligations under the ECHR in relation to measures taken against the Covid-19 pandemic, but concluded that it was not necessary.[673] As discussed above, in 2021, Latvia and Moldova notified the Council of Europe of their intention to derogate again from the ECHR, during a resurgence in Covid-19 infection rates. All States, except Georgia, have now withdrawn their derogations, whereas Georgia has indicated that it plans to continue its derogation until January 2023.

The Court has not explicitly addressed the validity of any of the derogations introduced during the Covid-19 pandemic. However, as Georgia continues to prolong its state of emergency and its derogation, this length of this derogation could give rise to a complaint.

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the context of the COVID-19 pandemic", Council of Europe Treaty Office, 29 June 2020.

[672] See: https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/recours-article-15-cedh/ "La recours à l'article 15 de la Convention européenne des droits de l'homme", J.P. Costa, le club des juristes, 27 April 2020; https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/la-convention-edh-face-au-covid-19-depasser-les-apparences/ "La Convention EDH face au Covid-19: dépasser les apparences", F. Sudre, le club des juristes, 27 April 2020; https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/la-restriction-vaudra-toujours-mieux-que-la-derogation/ "La restriction vaudra toujours mieux que la derogation…" S. Touzé, le club des juristes, 22 April 2020; https://www.academia.edu/42294162/Derogations_from_the_European_Convention_on_Human_Rights_The_Case_for_Reform, "Derogations from the European Convention on Human Rights – The Case for Reform", S. Wallace, academia.edu; https://verfassungsblog.de/covid-19-and-derogations-before-the-european-court-of-human-rights/ "Covid-19 and Derogations before the European Court of Human Rights", S. Molloy, Verfassungsblog on Matters Constitutional, 10 April 2020; https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/ "States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic", A. Greene, Strasbourg Observers, 1 April 2020; https://www.euractiv.com/section/justice-home-affairs/news/coronavirus-derogations-from-human-rights-send-wrong-signal-say-meps/ "Coronavirus derogations from human rights sends the wrong signal, says MEPs", V. Makszimov, euractiv news, 24 March 2020.

[673] https://rm.coe.int/0900001680a8311e "Draft CDDH report on member States' practice in relation to derogations from the European Convention on Human Rights in situations of crisis", Steering Committee for Human Rights (CDDH), 29 September 2022, the report incorporates the responses of 28 States to a questionnaire concerning their approach to derogation, and cites Belgium, France, Lithuania and Poland as States that considered derogating during the pandemic, but did not, and reports that Estonia considered derogating for a second time, but did not.

Does the Covid-19 pandemic constitute a public emergency threatening the life of the nation?

There is little doubt that in many countries the Covid-19 pandemic constitutes or has constituted an exceptional situation of crisis or emergency which affects the whole population and threatens the organised life of the community. It is less clear, however, if the normal measures or restrictions to rights which are permitted by the Convention are "plainly inadequate" in the context of tackling the pandemic and thus whether a derogation is justified.[674] This has led to a situation in which certain States have deemed it necessary to derogate from the Convention to implement measures which are broadly similar to those implemented by States who have not derogated from the Convention, but which believe the measures to be justifiable under the exemptions contained in the Convention.[675]

The Court has implicitly suggested that it would be open to States to conclude that the Covid-19 pandemic constitutes a public emergency threatening the life of the nation, but it has not explicitly ruled on whether any of the derogations were / are valid.[676] This reflects the approach taken by several other Council of Europe bodies which have stated that the use of the usual restriction clauses related to the protection of health should in many cases have been sufficient to justify the restrictive measures adopted in response to the pandemic, but that, exceptionally, specific national measures may have required derogations from the obligations under the Convention.[677]

[674] *Denmark, Norway, Sweden and the Netherlands v. Greece* (the "Greek case"), Report of the Commission, nos. 3321/67, 3322/67, 3323/67 and 3344/67, § 153

[675] See https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/ "COVID-19 Symposium: To Derogate or Not to Derogate?", Martin Scheinen, Opinio Juris, 6 April 2020

[676] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, §§ 68 and 90 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case. The third section of the Court noted that other States, conscious of the fact that a general ban on the right to protest would be incompatible with Article 11, chose to formally derogate from the ECHR, and where it was relevant to the finding of a breach of Article 11, that Switzerland had not chosen to derogate.

[677] For example, the Council of Europe Director of Legal Advice and Public International Law on this topic in the Memorandum on COVID-19 – Derogations under Article 15 of the European Convention on Human Rights, JJ011/2020 AG/gd, 16 March 2020 and the Secretary General of the Council of Europe, in the toolkit: Respecting

As discussed above and in Chapter I of this publication, States are not permitted to derogate from Articles 2 and 3 (the rights to life and to freedom from inhuman and degrading treatment), even during an emergency situation. Whilst States may be permitted to derogate from Articles 8 – 11 of the Convention, States are also permitted to interfere with these rights (without the need for a derogation) to the extent necessary in a democratic society, for the purposes of protecting public health, safety and order, provided the interference is prescribed by law. Further, Article 5 of the Convention permits the lawful detention of persons to prevent the spreading of infectious diseases. Chapter I provides examples of situations which have arisen in the context of the pandemic which may constitute an interference with Articles 8 to 11, or a deprivation of liberty under Article 5. It also provides guidance on the conditions States must meet to ensure such situations involving a deprivation of liberty or an interference with Articles 8 to 11 are Convention compliant.

The right to a fair trial under Article 6 is another right from which derogations are permitted under Article 15, but which does not contain an explicit exemption for the purpose of protecting public health. The issues which might arise for States trying to secure compliance with the requirements of Article 6 during the pandemic are discussed in the section on Article 6 (Right to a fair trial) in Chapter I of this publication. If States deemed it necessary to interfere with this right as part of their response to the pandemic, the lack of a relevant permitted limitation could constitute an argument to justify derogation. However, the relevant section in Chapter I of this publication does contain suggestions on how States can seek to ensure compliance with Article 6 even during the pandemic, for example through the creative use of technology.

Further, Article 6 did not feature in the notifications made by States to justify their derogations from the Convention in light of Covid-19. The measures envisaged in the notifications included unspecified restrictions on freedom of movement,[678] prohibitions on entry and exit to the State, heavy fines and strict measures to

democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis, SG/Inf(2020)11, 7 April 2020

[678] See https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354; "Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic", Council of Europe Treaty Office, 29 June 2020. In particular, the Declaration in the Note Verbale from the Permanent Representation of the Republic of Moldova dated 20 March 2020; the Declaration in the Note Verbale from the Permanent Representation of Romania dated 18 March 2020.

enforce confinement, the conditional release of prisoners, the possible prolongation of prison sentences, the coordination of media activities and limits to the types and sources of information permitted to be published about Covid-19.[679]

The Court has suggested that measures such as a blanket ban on the right to protest, might be the type of measures in relation to which a derogation is appropriate, given that such general restrictions are generally more difficult to justify in accordance with Article 11 § 2.[680] However, these examples of the reasons for which derogations were made raise alarm about the potential width of the measures that derogation was used to implement. For example, blanket bans on freedom of movement, assembly and entry and exit to a State may go beyond what was strictly necessary to protect public health, if other less restrictive measures could have been introduced (such as imposing conditions on the right to assembly to limit health risks, including a requirement to wear masks, keep distant and only meet outdoors).[681] Measures to control the information published about Covid-19 may have obstructed the necessary transmission of information about the pandemic and actually hindered the protection of health, highlighting the necessity of effective checks to ensure that measures introduced under a state of emergency actually serve the purposes for which a derogation was made.[682]

[679] See https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354; "Notifications under Article 15 of the Convention in the context of the COVID-19 pandemic", Council of Europe Treaty Office, 29 June 2020. In particular, for 'exit and entry' see the Declaration from the Permanent Representation of the Republic of Armenia dated 20 March 2020; for 'heavy fines and strict measures to enforce confinement' see the Declaration from the Republication of Albania dated 1 April 2020; for 'the conditional release of prisoners and the possible prolongation of prison sentences' see the Declaration from the Permanent Representation of Latvia dated 16 March 2020; for the 'coordination of media activities' see the Declaration from the Permanent Representation of Estonia dated 20 March 2020; for the 'limits to types and sources of information' see the Declaration from the Permanent Representation of Romania dated 18 March 2020.

[680] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 68 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[681] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 68 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[682] For further discussion on this particular issue and examples of the such restrictions, see the section on Article 10

Finally, as emphasised in Chapter I, where measures which restrict rights are taken to respond to exceptional situations of crisis, the Court has generally permitted States to interpret the scope of the permitted restrictions under Articles 8-11 broadly. A derogation under Article 15 may therefore have been unnecessary if even extensive interferences with rights may be justifiable in pursuit of the legitimate aim of protecting the health of the nation and the right to life in a time of crisis.

To derogate?

Adopting the approach that derogation is unnecessary because the Court will afford States a wide margin of appreciation to interfere with rights in this context may however risk diluting human rights protections. This approach risks normalising the implementation of exceptional powers, expanding the scope of the permitted limitations to cover a wider set of circumstances and altering the test applied to justify their use. An expanded notion of the permitted restrictions to these rights may then become entrenched and invoked beyond the context of responding to Covid-19. The risk is that instead of a 'disapplication' of certain Convention rights through derogation, the respect for these very same rights would suffer equally through a method of 'accommodation' of Convention rights in a situation that is of on emergency character.[683] An advantage of declaring a derogation is that a clear line is drawn between the limitations to rights which are permissible in ordinary circumstances and those which are permissible only in the context of responding to the Covid-19 crisis. A derogation can represent acceptance that any limitations to rights must be temporary, subject to review and employed only for the purpose of tackling the impact of an emergency.[684]

(Right to free expression) in Chapter I of this publication.

[683] See for this debate: *Hassan v. the United Kingdom*, Grand Chamber judgment of 16 September 2014, no. 29750/09, the Dissenting Opinion of Judge Spano, joined by judges Nicoloau, Bianku and Kalaydjieva where it is said that " Furthermore, as the *disapplication* option is off the table, since no derogation from the Convention has occurred, this novel method of *accommodation* cannot be implemented in such a manner as to have effectively the same legal effects as *disapplication*."; See also the debate in the United Kingdom House of Lords in *Al-Jedda* case *(R. (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58.

[684] For example, in the view of the Venice Commission "derogation may give a clear indication that certain exceptional measures are truly exceptional and do not "make the law"." See: reflections on respect for democracy, human rights and the rule of law during states of emergency, CDLAD (2020)014, 19 June 2020

Or not to derogate?

However, derogating from the obligations under the Convention risks imposing an even lower justificatory threshold on those seeking to limit rights and may enable States to interfere with rights to a greater extent than necessary, without the same level of scrutiny that comes from the test of necessity and proportionality required to justify an interference with rights under the permitted restrictions. In theory, after a derogation, rights should be limited only to the extent required by the exigencies of an emergency situation and the principles of proportionality and legality remain relevant.[685] In practice, it may be difficult to ensure compliance with this requirement.

Following the notification process under Article 15 § 3, there is no opportunity for the Court to scrutinise the justification for a derogation until a claim reaches the Court potentially years after the measure is adopted, and often where the state of emergency is no longer in place.[686] A check-box approach, whereby notification suffices as a precondition to the implementation of a derogation has been criticised by the UN special rapporteur on terrorism[687] who notes that problems with derogation procedures need to be addressed at the outset, rather than retrospectively, to avoid long delays in addressing potential abuses of the derogation process. On the other hand, interferences with Convention rights in individual cases by Member States that have not derogated might also take time to reach Strasbourg.

The Parliamentary Assembly of the Council of Europe has expressed concern that protracted states of emergency and derogations have the effect of normalising lower standards and habituating populations to greater interference with their rights. On this basis, the Assembly recommended that States take

[685] For further discussion of the requirements of legality and proportionality during a state of emergency see Chapter III of this publication.

[686] See for example, *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05; *Aksoy v. Turkey*, judgment of 18 December 1996, no. 21987/93; *Brannigan and McBride v. United Kingdom*, judgment of 26 May 1993, nos. 14553/89 and 14554/89; *Lawless v Ireland (No. 3)*, judgment of 1 July 1961, no. 332/57; *Şahin Alpay v. Turkey*, judgment of 20 March 2018, no. 16538/17

[687] See https://www.ohchr.org/Documents/Issues/Terrorism/A_HRC_37_52.pdf "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights challenge of states of emergency in the context of countering terrorism", Report Human Rights Council of the United Nations, 27 February 2018.

a cautious, progressive approach to emergency measures, adopting those that require derogation only as a last resort, when strictly required because other, less restrictive options prove inadequate.[688]

The importance of scrutiny

Clearly, there were real risks to human rights protection posed by States' responses to the Covid-19 pandemic, whether they derogated from the Convention or not. The question of whether a derogation was justified by the pandemic depends on the nature of the measures taken by a State, whether they could be justified under the normal, permitted exceptions, whether they are effective means of protecting health and whether they are used only for the purposes for which they were introduced. The course and development of the Covid-19 pandemic was unpredictable and the fluid nature of the situation meant that the responses to these questions, and the nature of the measures needed to respond effectively to the pandemic, remained subject to constant change. However, our analysis in Chapter I of this publication of the measures taken by States to respond to the pandemic, and their impact on human rights, did not identify any area in which it appeared entirely impossible for States to respond to the pandemic within the parameters of the normal measures or restrictions permitted by the Convention.

Even if a derogation was found to be justified at a certain point in time, it would be necessary to ensure that it remained justified for its entire duration and remained subject to constant review. Effective scrutiny of the measures taken after a derogation is essential to ensure that responses to Covid-19 do not undermine the wider status of human rights protection beyond the pandemic.[689] The necessity of scrutiny and the different ways in which it can be implemented are discussed in more detail in Chapter III of this publication. In the view of the

[688] 26 T 26 Resolution 2338(2020), The impact of the Covid-19 pandemic on human rights and the rule of law.

[689] *Dareskizb Ltd v. Armenia*, judgment of 21 September 2021, no. 61737/08, § 58, where the Court accepted that weight must be attached to the judgment of Armenia's executive and parliament regarding whether there was a 'public emergency threatening the life of the nation'. However, when disagreeing with their conclusion on this question, the Court noted that the necessity of declaring a state of emergency and the particular measures involved were never subjected to any domestic judicial scrutiny. This was contrasted to the situation in *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, no. 3455/05, § 177, and *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 13237/17, § 93, cases in which the Court agreed with the States' conclusions regarding the existence of a public emergency threatening the life of the nation.

Council of Europe Steering Committee for Human Rights (CDDH), most of the derogations introduced during the pandemic were relatively brief in duration, arguably showing a recognition of their exceptional nature. The fact that, as the situation evolved, certain States withdrew and reinstated derogations or reduced their scope suggests that those States arguably were alert to the need to derogate only when, and to the extent, strictly required.[690]

[690] https://rm.coe.int/0900001680a8311e "Draft CDDH report on member States' practice in relation to derogations from the European Convention on Human Rights in situations of crisis", Steering Committee for Human Rights (CDDH), 29 September 2022, see the conclusions of the report at § 97.

Chapter III - Institutional and procedural guarantees during a crisis situation

Crisis situations such as the Covid-19 pandemic, during which wide powers are accorded to the executive, have the potential to be abused to threaten the foundations of constitutional democracy.[691] Human rights violations might also increase as arbitrary or unnecessary interferences with rights are made in the name of protecting health.[692] Responses to the Covid-19 pandemic were characterised by a shift in power from the legislative to the executive branch of governments. Across Europe, the primary responsibility for the emergency response fell on the

[691] See: "The Impact of COVID-19 Measures on the Rule of Law in the Western Balkans and the Increase of Authoritarianism", Andi Hoxhaj and Fabian Zhilla, European Journal of Comparative Law and Governance, pages: 271–303, Online Publication Date: 24 Aug 2021 which argues that Covid-19 has exposed more openly the weaknesses in the existing system of checks and balances in the Western Balkans and presented a new opportunity for leaders in the Western Balkans to implement further their authoritarian model of governance in undermining the rule of law. Another example is the "normalisation of emergency powers" to deal with people suspected of terrorism-related crimes following 9/11 and other major incidents of a terrorist nature: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf "EU and Member States' policies and laws on persons suspected of terrorism-related crimes" Committee on Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, Directorate General for the Internal Policies of the Union, December 2017; An example in the context of the Covid-19 Pandemic is the concern that Hungary's government approved extraordinary powers that could see the Prime Minister seize power indefinitely, as part of changes put in place to fight the Covid-19 crisis: https://www.forbes.com/sites/isabeltogoh/2020/03/30/death-of-democracy-hungary-approves-orbans-controversial-emergency-powers/#7719cc74360d "Death of democracy? Hungary approves Orban's Controversial Emergency Powers" by I.Togoh, Forbes, 30 March 2020.

[692] See: https://verfassungsblog.de/states-of-emergency/ "States of Emergency", Joelle Grogan, VerfBlog, 26 May 2020, which gives the example of the Hungarian Government using the legislative powers granted to it during the pandemic to suspend the operation of the GDPR in Hungary, and to transfer the most profitable revenue-sources for local governments to county governments in areas controlled by opposition parties – neither of which had a plausible connection with Covid-19.

executive branch, while legislatures generally performed an oversight function, and the intensity of parliamentary scrutiny of the executive varied across States.[693] Many States declared a state of emergency and/or granted exceptional powers to the executive to design and implement measures ordinarily outside their area of competence.[694] Others relied on 'ordinary' or existing legislation as the basis on which to introduce extraordinary measures.[695]

In view of such dangers, the UN High Commissioner for Human Rights warned that "*Emergency powers should not be a weapon governments can wield to quash dissent, control the population, and even perpetuate their time in power.…They should be used to cope effectively with the pandemic – nothing more, nothing less.*"[696]

[693] "Constitutions and Contagion. European Constitutional Systems and the Covid-19 Pandemic", Angelo Jr Golia, Laura Hering, Carolyn Moser, Tom Sparks, MPIL Research Paper Series No. 2020-42. See also, on the use of executive powers in the United Kindgom: "*Government by decree: Covid-19 and the Constitution*", Lord Sumption, Cambridge Freshfields Annual Law Lecture, 27 October 2020.

[694] See https://www.hugenwb.net/uploads/materials/The%20Parliamentary%20Response%20to%20COVID-19%20and%20States%20of%20Emergency%20(SoE)%20in%20the%20Western%20Balkans.pdf "The Parliamentary Response to COVID-19 and States of Emergency (SoE) in the Western Balkans: Second Report", I.Radojevic and N.Stankovic, Westminster Foundation for Democracy: Human Rights and Gender Equality Network of Committees in the Western Balkans (HUGEN). All Western Balkan States, except Montenegro, introduced a state of emergency, state of natural health disaster, or public health emergency situation, in accordance with the procedure set out in their constitutions. In Montenegro, the government passed over 25 ordinances in accordance with Article 39 of the constitution which specifically authorises derogation from the right to free movement if it is expedient for the prevention of infection. See also "A Human Rights and Rule of Law Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 27 Jurisdictions", Bonavero Reports Series, n. 7/2020, 30 October 2020. See also the discussion on the exceptional measures taken by States to respond to the pandemic in Chapter II (Derogations) within this publication. See also "La liberté individuelle face au Covid-19 : l'adaptation des garanties de l'article 66 de la Constitution aux circonstances d'urgence sanitaire (1re partie)", Annabelle Pena, actu-juridique.fr, 1 December 2020 in relation to the new 'state of a health emergency' declared in France.

[695] See: https://verfassungsblog.de/states-of-emergency/ "States of Emergency", Joelle Grogan, VerfBlog, 26 May 2020. The blog provides a comparative study on the emergency measures taken by Governments around the world in response to Covid-19 pandemic, and includes Ireland and Turkey as examples of States that did not declare a 'state of emergency', for example because the crisis did not constitute an 'emergency' within their constitutional provisions or because it was believed that there were sufficient powers and/or mechanisms within ordinary legislation.

[696] "COVID-19: Exceptional measures should not be cover for human rights abuses and violations", Office of the UN

Given the speed with which measures needed to be introduced to combat Covid-19 and the breadth of issues which these measures addressed, delegation of law-making powers to the executive may have been necessary to facilitate the rapid implementation and modification of new measures. It may also have had the advantage of encouraging input from relevant experts within administrative bodies.[697] However, in numerous states there was a lack of input from human rights and equality experts in the executive-led decision-making structures.[698] Other issues which arose included uncertainty regarding the distinction between government guidance/advice and the law/legally enforceable regulations and enforcement of guidance as if it were law, due to governments presenting public health advice as though it were criminally enforceable.[699]

The unprecedented scope of the measures introduced to combat Covid-19, the breadth of issues they addressed and the speed with which they were introduced meant that scrutiny of their impact on human rights, and of their compliance with the principles of legality and proportionality was vital.[700] The European Commission considered the Covid-19 pandemic to be a stress test for rule of law resilience.[701] It certainly highlighted a need to clarify the scope of States'

High Commissioner for Human Rights, 27 April 2020

[697] For example, in the Republic of North Macedonia, the minister of health formed a crisis headquarters composed only of medical experts in the field of infectious diseases who gave specialist recommendations for containing the pandemic and was responsible for informing the public about the pandemic, see "The Parliamentary Response to COVID-19 and States of Emergency (SoE) in the Western Balkans: Second Report", I.Radojevic and N.Stankovic, Westminster Foundation for Democracy: HUGEN, page 16.

[698] "Ireland's Emergency Powers During the Covid-19 Pandemic: Report by the COVID-19 Law and Human Rights Observatory at Trinity College Dublin", on behalf of the Irish Human Rights and Equality Commission

[699] See for example: "Ireland's Emergency Powers During the Covid-19 Pandemic: Report by the COVID-19 Law and Human Rights Observatory at Trinity College Dublin", on behalf of the Irish Human Rights and Equality Commission, see also "Constitutions and Contagion. European Constitutional Systems and the Covid-19 Pandemic", Angelo Jr Golia, Laura Hering, Carolyn Moser, Tom Sparks, MPIL Research Paper Series No. 2020-42, page 26, which gives the example of the United Kingdom Prime Minister, on 23 March 2020, announcing in a video via the Government's social media channels, that the Government's advice that individuals observe social distancing and remain at home would be replaced with a legally enforceable lockdown. It was only on 26 March 2020 that a legal basis for the lockdown was provided. However, there are reports that police officers begun to take action to enforce the new lockdown requirements as early as the 24 March.

[700] See: "Pandemocracy in Europe, Power, Parliaments and People in Times of COVID-19", Matthias C Kettemann and Konrad Lachmayer, Hart Publishing, 2022

[701] "2020 Rule of Law Report: The rule of law situation in the European Union", COM/2020/580 final, 30 September

emergency powers, the context in which they can be used and the procedures by which they must be introduced.[702]

The measures imposed to respond to the pandemic rendered it more difficult to carry out traditional methods of scrutiny or to hold governments to account, as legislatures were not able to meet and courts were closed. The Council of Europe and the Venice Commission both produced useful guidance on ensuring accountability and respect for human rights during a time of emergency.[703] They stress that respect for the principles of legality and proportionality is non-negotiable, although these terms may take on different meanings during times of emergency. States were required, therefore to work to ensure that robust scrutiny was carried out at a time when the need to hold the government to account was more important than ever, but when the mechanisms for doing so were unable to operate as they normally would.

2020.

[702] "Constitutions and Contagion. European Constitutional Systems and the Covid-19 Pandemic", Angelo Jr Golia, Laura Hering, Carolyn Moser, Tom Sparks, MPIL Research Paper Series No. 2020-42

[703] See https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e-1f40 "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states" Council of Europe Information Documents, SG/Inf (2020) 11, 7 April 2020 and https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)005rev-e "Respect for democracy, human rights and the rule of law during states of emergency – reflections", by N.Alivizatos et al., European Commission for Democracy Through Law (Venice Commission), CPL-PI(2020)005rev, 26 May 2020.

1. The criteria against abuse

Even in an emergency situation, the Council of Europe and the Court have stressed that the rule of law must prevail.[704] Whilst States may need to take exceptional measures to respond to an emergency situation, these measures must still comply with the paramount Convention principles of lawfulness and proportionality. The criteria of legality and proportionality are relevant to assessing the justification of an interference with Articles 8-11, as discussed in the sections on Articles 8 (Right to respect for private and family life), 10 (Right to free expression) and 11 (Right to freedom of association and manifestation) within this publication.[705] Legality and proportionality are also relevant to an assessment of whether a derogation under Article 15 complies with the Convention.[706]

As discussed in Chapter II of this publication, following a derogation under Article 15, States are permitted to derogate from their obligations to secure protection of the remaining Convention rights only to the extent strictly required by the situation.[707] In making this assessment, the Court takes account of the proportionality and legality of the measures taken, including whether they are a genuine response to the emergency situation, whether they were used for the purpose for which they were granted, whether the derogation is limited in scope, whether the need for the derogation was kept under review, whether the measures were subject to strict safeguards, whether they involved any justifiable discrimination and whether the measures were introduced in a procedure in accordance with law and subjected to judicial control and review.

[704] *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 13237/17, §§ 94 and 210; and Şahin Alpay v. Turkey, judgment of 20 March 2018, no. 16538/17, §§ 78 and 180 (included as a summary in this publication).

[705] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 91 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[706] *Brannigan and McBride v. the United Kingdom*, plenary Court judgment of 25 May 1993, nos. 14553/89 and 14554/89, § 43 (included as a summary in this publication); *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February, no. 3455/05, § 173 (included as a summary in this publication).

[707] *Brannigan and McBride v. the United Kingdom*, plenary Court judgment of 25 May 1993, nos. 14553/89 and 14554/89, § 54 (included as a summary in this publication).

a. Legality

Almost all States introduced some form of special regime to increase executive powers to respond to the Covid-19 pandemic, either declaring a state of emergency or introducing new legislation and/or regulations specifically aimed at responding to Covid-19.[708] The procedure for introducing a state of emergency, the procedure for introducing new legislative powers, and the measures introduced under emergency powers must comply with the principle of legality.

The procedure for introducing a state of emergency or emergency powers

There should be clear and accessible rules on when emergency measures can be introduced or when a state of emergency can be declared. These rules should be drafted in advance of the emergency situation which they are introduced to address. They should set out a clear procedure for determining if an emergency situation exists and how exceptional measures can be approved. A declaration of emergency, or emergency laws introduced outside the ordinary legislative procedure, must make clear the legal and factual grounds on which they are being introduced, the scope of the powers introduced, who is competent to act under such powers and the exact situations in which they can be utilised.[709]

Measures introduced under emergency powers

Emergency measures must be introduced and implemented in accordance with the relevant procedures prescribed by domestic law. Compliance with such

[708] See https://www.hugenwb.net/uploads/materials/The%20Parliamentary%20Response%20to%20COVID-19%20and%20States%20of%20Emergency%20(SoE)%20in%20the%20Western%20Balkans.pdf "The Parliamentary Response to COVID-19 and States of Emergency (SoE) in the Western Balkans" by I.Radojevic and N.Stankovic, Westminster Foundation for Democracy: Human Rights and Gender Equality Network of Committees in the Western Balkans. All Western Balkan States, except Montenegro, introduced a state of emergency, state of natural health disaster, or public health emergency situation, in accordance with the procedure set out in their constitutions. In Montenegro, the government passed over 25 ordinances in accordance with Article 39 of the constitution which specifically authorises derogation from the right to free movement if it is expedient for the prevention of infection.

[709] See the Venice Commission's rule of law checklist for a more detailed breakdown of the requirements of the principle of legality https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf : "The rule of law checklist", Venice Commission of the Council of Europe, adopted at its 106th Plenary Session, 11-12 March 2016.

procedures, for example the requirement to publish a regulation before it has legal effect,[710] are particularly important to secure foreseeability and clarity of the law during times of emergency, where regulations on the public's behaviour change rapidly in response to the emergency situation. For the same reasons, any laws and/or measures introduced under the state of emergency or using emergency legislative powers must be sufficiently clear in scope to enable the public to understand what is required of them, to adapt their behaviour accordingly and to guard against disproportionate or inconsistent enforcement or interpretation by law enforcement officers or courts. States must ensure their populations are sufficiently informed of the exact substantive, territorial and temporal scope of the application of a state of emergency, as well as the powers and laws introduced to respond to the emergency. This may require the authorities to make regular communications with the public through diverse channels including, for example, radio, television, internet, poster publicity and letters through the post, in all official languages of the State as well as languages commonly spoken within different areas of the State.[711] When communicating with the public, the authorities must make clear the distinction between public health advice and government guidance, compared to legally enforceable obligations on the public to act a certain way, to ensure that the public can also properly understand and foresee the consequences of their actions.[712]

[710] See, for example, the decision of the Slovenian Constitutional Court, no. U-I-445/20-13. The case concerned a challenge to a ministerial order that education be provided remotely. Because the minister's order regulated the legal position of an indefinite number of the legal and natural persons, it was, by its nature, a regulation. According to domestic procedure, a regulation only enters into force if it is published in an appropriate manner. Because the Minister's order was not published appropriately it was held not to have entered into force and it was not to be applied.

[711] See for example the recommendations of the United Kingdom Joint Committee on Human Rights at: https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/correspondence/Chairs-briefing-paper-regarding-Health-Protection-Coronavirus-Restrictions-England-Regulation-2020.pdf

[712] See, for example, the decision of the Slovenian Human Rights Ombudsman that a person could not be penalised for failure to comply with a government decree ordering mandatory wearing of face masks in enclosed public spaces. Under the relevant legal provisions, fines could only be imposed for breach of measures adopted under a certain chapter of the Infectious Diseases Act. Whilst the decree was worded as an obligation, it was not introduced under the required chapter of the Act, meaning it could not be forcibly implemented: https://www.varuh-rs.si/en/news/news/ombudsman-says-failure-to-wear-mask-in-enclosed-spaces-cannot-be-penalised/

b. Proportionality

The principle of proportionality requires that States only take measures which are strictly required by the emergency situation. Where exceptional powers are introduced, they must only be used for the reasons for which they were granted. States may need to grant legislative powers to executive decision makers which are sufficiently broad to grant them the flexibility to respond quickly and effectively to the evolving nature of the Covid-19 pandemic. However, the powers must be formulated as narrowly as possible in the situation and specify exactly what contexts in which they can be used and the purposes for which they should be used. Emergency situations must not be used to provide the executive with a carte blanche to act in any way they choose, or to take measures in areas unrelated to the emergency.

When assessing the proportionality of a measure, it is relevant to take account of the level of pre-existing knowledge and experience the Government had in responding to such a situation, as well as the level of risk posed to the individual and to those around them at the time the measure was introduced.[713] Both factors changed significantly over the course of the pandemic, which saw various cycles of surges and dips in infection rates. The way the proportionality test is applied should respond to such changes. More restrictive measures might have been easier to justify at the start of the pandemic, due to the sudden and unexpected nature of the risk posed, and the lack of understanding and scientific research regarding how best to respond to it. However, as States experienced 'second' and 'third' waves of the pandemic, they can be expected to have provided stronger, more evidence-based justifications to demonstrate that the measures taken were 'strictly required' and the margin of appreciation afforded to them is likely to be lower.[714]

[713] https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/2021_Supplement_to_the_ELI_Principles_for_the_COVID-19_Crisis.pdf "ELI Principles for the Covid-19 Crisis", 2021 Supplement, Principle 16: "Proportionality of measures in cases of low epidemiological risk" provides that scientific evidence must be regularly evaluated to ensure restrictions are lifted as the epidemiological risk reduces.

[714] See, for example, Judgement Pl. ÚS 106/20 of 9 February 2021, where the Czech Constitutional Court criticised the Czech Government for failing to provide rational, scientifically supported justification for the emergency measures introduced in January 2021. The domestic court found that the Government had had more time and practical experience to gather all necessary expert evidence and information, assess the impact of various emergency measures on controlling the spread of Covid-19 and adjust its pandemic preparedness plan accordingly since, at the time of its adoption, the pandemic had been raging for almost a year. Higher demands were placed

Temporality

Emergency measures should be limited in duration. A clear time limit on their existence or a 'sunset clause'[715] should be included in the text which introduces them. There must be continuous and periodic parliamentary or judicial review of the continued necessity of emergency measures and when the initial time limit for their existence expires, they must only be extended if necessary. The burden must be on the executive to demonstrate the necessity of any extension.

Some States included time limits on the emergency powers they introduced to respond to the pandemic, ranging from an initial period of 30 days, to 6 months. In other States, no time limit was introduced at all.[716] A lack of any temporal limit on these powers will clearly breach the requirement of proportionality. In the context of the pandemic and in light of how quickly the level of risk posed by Covid-19 could change, even where a time limit on emergency powers was included, this would not necessarily meet the requirements of proportionality. The level of risk posed by Covid-19 and the types of measures needed to prevent the spread of Covid-19 fluctuated dramatically within the space of months or even weeks. States needed to be mindful of how quickly the nature of the pandemic could change when setting the time limits within which emergency powers should be reviewed.

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on the justification for the interference with fundamental rights and stricter scrutiny was required than in March 2020. The court found long-term and repeated interferences with fundamental rights significantly more invasive and "painful" than short-term and temporary restrictions.

[715] A 'sunset' clause stipulates how long a piece of legislation, provision or power will exist. After the date specified in the sunset clause, the legislation, provision or power will expire and cease to have effect unless further action is taken to extend it.

[716] For example in the United Kingdom the emergency powers under the Coronavirus Act 2020 are valid for six months before parliamentary review: https://www.legislation.gov.uk/ukpga/2020/7/section/98/enacted "s. 98 Coronavirus Act 2020"; See also Albania which initially allowed for the use of emergency powers for 30 days from 24 March 2020 but has since been extended: https://verfassungsblog.de/albania-some-exceptional-extraordinary-measures/ "Albania - Some Exceptional Extraordinary Measures", L. Bianku, Verfassungsblog on Matters Constitutional, 17 May 2020; See also Hungary where the Authorisation Act 2020 granted indefinite emergency powers to the Prime Minister but later voted to revoked the powers: https://www.euronews.com/2020/05/28/coronavirus-hungary-bid-to-end-emergency-powers-an-optical-illusion-say-human-rights-ngos "Coronavirus: Hungary bid to end emergency powers 'an optical illusion', say human rights NGOs", R. Palfi and L. Chadwick, Euronews, 28 May 2020.

Enforcement

Proportionality is also relevant to the ways in which measures are applied and enforced. Criminal sanctions should be used as a last resort to enforce restrictions on rights imposed to respond to an emergency and fines should not be unreasonably high. Further, emergency powers must not be enforced in a discriminatory manner,[717] or to further any aim other than the purpose for which they were explicitly introduced. For example, concerns have been raised that sanctions introduced to regulate compliance with restrictions on movement were used to silence opposition voices, rather than to protect health, as they were enforced against people who did not demonstrably pose a risk to health.[718] Whenever sanctions are imposed on individuals under emergency powers, enforcement officers must be able to provide concrete evidence of a breach of the relevant provision under the emergency powers and must be able to demonstrate that enforcement action served to fulfil the purpose for which the powers were introduced.

Additionally, the continued existence of an independent and effective prosecution service during a time of emergency is an essential aspect of ensuring that any criminal sanctions for breach of emergency measures are pursued in a proportionate, non-discriminatory manner.[719] Where the context of an emergency renders it more difficult for prosecutors to conduct their role, prosecutors should introduce objective criteria and guidance to justify their decisions to prioritise investigations and prosecutions of certain alleged offences over others.[720]

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[717] Concerns about the engagement of military forces to police restrictions on movement and about the disproportionate application of restrictions to minority communities are discussed in the section on freedom from discrimination in this publication.

[718] For example in Serbia an artist who publicly supported the opposition's electoral boycott in Serbia, was arrested for breaking self-isolation measures, despite the fact she returned from Montenegro to Serbia a day before the state of emergency was announced and had not received written or verbal instruction for self-isolation after coming from abroad: https://biepag.eu/crisis-at-europes-periphery-serbian-democracy-in-quarantine/ "Crisis at Europe's periphery – Serbian democracy in quarantine" by L.Lohmann and S.Stojković, BiEPAG Blog, 16 April 2020.

[719] https://rm.coe.int/opinion-no-15-ccpe-en/1680a05a1b CCPE Opinion No. 15 (2020):The role of prosecutors in emergency situations, in particular when facing a pandemic

[720] For example, in Serbia, several civil society organisations brought charges against police brutality, but the Public Prosecutor's Office refused to investigate any of the charges, citing the government's position that the police were only applying the Covid-19 rules against mass gatherings, arguably as a result of undue pressure being

2. The guarantees against abuse

There must be mechanisms for review built into any scheme for introducing emergency measures to ensure that the proposed measures are likely to solve, ameliorate or at the very least not exacerbate the problem which they are designed to solve, and that they are in reality being applied and enforced to do the same.[721] If it is not feasible for this to take place through the ordinary legislative process, then there must be scope for some other form of parliamentary, judicial or expert review to take place which is factored into emergency measures.[722]

a. Parliamentary control

Mechanisms must be in place for the legislative branch of governments to check that the declaration of a state of emergency complies with the requirements of legality and proportionality, to assess the necessity of prolongation and

placed on the Prosecutor's Office by the government, see: "The Impact of COVID-19 Measures on the Rule of Law in the Western Balkans and the Increase of Authoritarianism", Andi Hoxhaj and Fabian Zhilla, European Journal of Comparative Law and Governance, pages: 271–303, Online Publication Date: 24 Aug 2021.

[721] For example, the OECD highlights the risk of Governments using emergency procurement procedures introduced during the pandemic to avoid the standard, albeit lengthy, procurement processes, thereby increasing the risk of fraud, corruption and procuring goods that do not meet quality standards, see: "Public Integrity for an Effective COVID-19 Response and Recovery", 19 April 2020 at http://www.oecd.org/coronavirus/policy-responses/public-integrity-for-an-effective-covid-19-response-and-recovery-a5c35d8c/; see also: https://www.opengovpartnership.org/documents/a-guide-to-open-government-and-the-coronavirus/ "A Guide to Open Government and the Coronavirus", Open Government Partnership, 28 April 2020

[722] *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20, § 75 (included as a summary in this publication). This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case. The third section of the Court found that, taking account of the urgency with which governments were required to introduce a response to the pandemic, one would not necessarily expect that the measures introduced would be subject to detailed debate, in particular involving parliament. However, in such circumstances, the possibility of effective and independent judicial review of such measures was deemed to become even more important, See also: *Animal Defenders International v. United Kingdom*, Grand Chamber judgment of 22 April 2013, no. 48876/08, § 108 where the Court stressed that the quality of the parliamentary and judicial review of the necessity of a measure was of particular importance to the determination of its proportionality.

termination of emergency powers, to review how such powers have been used and whether they serve the purposes for which they were introduced.[723] Legislatures must seek to strike a balance between subjecting executive measures to constructive, critical challenge, and avoiding obstructionism or party-political delays to the emergency response. In exceptional circumstances, the Court accepts that it might be impossible to hold a parliamentary debate, in the midst of an urgent and unforeseen emergency. In such circumstances, all possible measures should be taken to reinstate parliamentary control of executive action as soon as possible.[724] If it is not possible to review the declaration of a state of emergency before it is implemented, or if it is not possible to legislate through the normal law-making procedure because of the urgency with which measures need to be introduced, the declaration of a state of emergency and the measures, laws, decrees etc. that are created under emergency powers must at least be put before the legislature for ex post facto review as soon as possible.[725]

[723] *Brannigan and McBride v. the United Kingdom*, plenary Court judgment of 25 May 1993, nos. 14553/89 and 14554/89, § 13 (included as a summary in this publication).

[724] See the concurring opinion of Judge Krenc, joined by Judge Pavli, in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20 §§ 20 - 22 (included as a summary in this publication) in which the importance of parliamentary scrutiny is underlined, it is stated that the quality of parliamentary debate is an essential aspect of any proportionality assessment and an indispensable counterweight to the powers of the executive, but in which the judges accept that there may be exceptional circumstances in which parliament cannot meet.

[725] See the criticism expressed on this point by Lady Hale, former President of the UK Supreme Court: https://www.theguardian.com/world/2020/sep/20/parliament-surrendered-role-over-covid-emergency-laws-says-lady-hale, last accessed 7.04.2022. She describes the initial passage of emergency legislation as a "crucial time" at which parliament should have control, rather than surrendering control to the executive only to resume its functions later. See also, the House of Commons and House of Lords, Joint Committee on Human Rights' report: "The Government's response to COVID-19: human rights implications", Seventh Report of Session 2019–21 14 September 2020, which stresses that, even if emergency powers are initially introduced without scrutiny from parliament, any extension to the expiry date of emergency provisions must be subject to parliamentary debate and approval before, not after, any extension comes into effect. See also "Prorogation de l'état d'urgence sanitaire et libertés", la Commission nationale consultative des droits de l'homme (CNCDH) France, Avis, A-2020–6 which stresses the importance of putting an immediate end to restrictive measures, as soon as they are no longer necessary.

Ex post facto review

The legislature should have the power to revoke the state of emergency and should be able to amend or strike down measures introduced if they do not believe that the requirements of legality or proportionality are met.[726] After the state of emergency is revoked, they should also have the power to launch a more substantive, detailed inquiry into the measures imposed by the executive.[727] Whilst ex post facto review may not suffice to prevent human rights abuses, it can serve to identify such abuses, and recommend how things could have been done differently. Such review is especially important in the context of the Covid-19 pandemic, in relation to which there have been numerous 'waves' of the virus and sporadic local peaks in infection. Review leading to lessons learned is therefore essential to equip States to effectively tackle further outbreaks of the virus, and respond to other emergency situations, whilst ensuring the maximum respect for fundamental rights.[728]

The impact of lockdowns and social distancing requirements

The restrictions imposed to respond to the Covid-19 pandemic rendered it difficult for parliaments to function as they ordinarily would, with restrictions on movement and assembly meaning they were not permitted to meet in person. However, the dissolution of parliament should not be a response to an emergency and where a legislature's mandate is due to end during an emergency, it should be extended until feasible to arrange elections. Legislatures therefore need to adapt their ways of working to maximise opportunities for members of the legislature

[726] For example, the Joint Parliamentary Committee on Human Rights in the United Kingdom carried out written and oral scrutiny of Covid-19 related legislation, produced regular reports on measures taken, collected written evidence from relevant parties and made recommendations to the Government to seek to ensure that its emergency response was compliant with human rights, in particular Article 2, and that any interference with derogable rights were proportionate, see the website of the Committee here: https://committees.parliament.uk/work/218/the-governments-response-to-covid19-human-rights-implications/publications/

[727] See for example the United Kingdom Covid-19 Inquiry , which will analyse (amongst many other issues) legislative and regulatory control and enforcement; the use of lockdowns and isolation; and the impact on mental health and wellbeing: https://covid19.public-inquiry.uk/terms-of-reference/

[728] See also the series of comparative studies of the European Parliament concerning the adoption of states of emergencies in different states, highlighting lessons learned and best practice, for example : "Droit d'Exception, une Perspective de Droit Comparé - France : lois d'urgence pour faire face à l'épidémie de Covid-19", a study by the research service of the European Parliament, PE 690.624–May 2021 (updated 1 June 2021)

to continue to scrutinise the legality, proportionality and effectiveness of measures taken to respond to the Covid-19 pandemic, even if this is not through the assembly of every member of the legislature to debate together, in-person, in parliament.

Introducing new technologies is a key part of this, to enable online discussion and voting to take place during the pandemic or other times of emergency.[729] Such innovation may also continue to present advantages beyond the pandemic, if it facilitates the participation of those who would benefit from remote participation in the legislature, such as members of parliament who live in remote regions, who travel from afar to reach the parliamentary building, or those who have childcare duties. Another method of working may be to permit limited numbers of legislators, with a proportionate number of representatives from each party, to enter parliament and vote / debate in person.[730]

Reports suggest that legislative oversight during the pandemic in the Western Balkans was low.[731] This includes a lack of parliamentary scrutiny of executive decisions to implement and extend a state of emergency, derogate from the ECHR and introduce emergency measures.[732] Of the Western Balkans States, only the

[729] For example, the European Parliament successfully held sessions remotely using video conferencing technology and introduced e-voting to continue to function during the pandemic.

[730] In Ireland where representatives met in person, representatives were split proportionately along party lines depending on seat numbers and required to maintain a minimum safe distance from one another See https://commonslibrary.parliament.uk/parliament-and-elections/coronavirus-how-are-parliaments-worldwide-working-during-the-pandemic/ "Coronavirus: How are parliaments worldwide working during the pandemic?" by J.Curtis and R.Kelly, House of Commons Library, 15 April 2020

[731] See: https://www.hugenwb.net/uploads/materials/The%20Parliamentary%20Response%20to%20COVID-19%20and%20States%20of%20Emergency%20(SoE)%20in%20the%20Western%20Balkans.pdf "The Parliamentary Response to COVID-19 and States of Emergency (SoE) in the Western Balkans" by I.Radojevic and N.Stankovic, Westminster Foundation for Democracy: Human Rights and Gender Equality Network of Committees in the Western Balkans, which reports that the number of oversight hearings, committee sessions, and processes of reviewing government has been at a low level.

[732] "The Impact of COVID-19 Measures on the Rule of Law in the Western Balkans and the Increase of Authoritarianism", Andi Hoxhaj and Fabian Zhilla, European Journal of Comparative Law and Governance, pages: 271–303, Online Publication Date: 24 Aug 2021, which provides the following examples: Serbia's President, Prime Minister and the President of Parliament jointly declared a state of emergency on 15 March 2020, without consulting members of the Serbian parliament and with no official explanation as to why Parliament could not be convened to declare the state of emergency itself; the Government of Albania derogated from certain Articles of

parliament of the Federation of Bosnia and Herzegovina organised a full plenary session online, while the majority of parliaments organised online committee sessions. There is also concern that committees and task forces assembled in response to Covid-19 did not include members of parliament. Any committees established to scrutinise the work of the executive in responding to emergencies should be made up of relevant experts (in this case those with both public health and human rights expertise) as well as elected representatives from all parties in government and from all regions in the State.

The Venice Commission has emphasised the importance of political plurality and effective opposition in guarding against the misuse of power and abuse of rights.[733] Any measures introduced to facilitate legislative scrutiny during the pandemic must therefore apply equally to members of all parties and representatives from all regions. Even where it is deemed safe for some members of the legislature to return to parliament, it may be necessary to maintain options for remote participation, to ensure the continued participation of representatives with health conditions, whose vulnerability may mean they are not yet ready to return to in-person voting and debate.[734]

b. Judicial control

Review by an independent and effective judicial body of the quality of laws introduced during a time of emergency, and the application of such laws in practice, is the other key way to prevent the abuse of rights during an emergency situation.[735] As discussed above, there should be clear and accessible rules and

the ECHR on 1 April 2020, and did not inform parliament or public of this derogation; and the executive of North Macedonia declared a state of emergency and introduced strict emergency measures whilst parliament was not in session because elections were scheduled.

[733] See https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)015-e "Parameters on the relationship between the parliamentary majority and the opposition in a democracy: a checklist", European Commission for Democracy Through Law (Venice Commission), CDL-AD(2019)015, 25 June 2019

[734] See for example the concerns in the United Kingdom that the decision to scrap remote voting in parliament had a discriminatory impact on MPs: https://www.euronews.com/2020/06/02/uk-mps-to-vote-on-whether-it-s-safe-to-return-to-parliament "Coronavirus: UK MPs vote for return to parliament after remote working during lockdown" by A. Tidey with Associated Press, Euronews, 2 June 2020.

[735] See the concurring opinion of Judge Krenc, joined by Judge Pavli, in *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, judgment of 15 March 2022, no. 21881/20 §§11, 18-19 and 23. This case was, however, referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is

procedures regulating when and how emergency measures can be introduced. Courts must also be able to review whether the executive followed such rules and procedures when a state of emergency was declared and/or emergency powers were introduced.[736] Provisions regulating the introduction of emergency powers should also include a mechanism whereby such judicial review takes place automatically.

States should ensure that courts remain open to the extent possible to enable individuals to challenge alleged infringements on their rights.[737] For example, courts should make innovative use of technology to hold remote hearings where necessary and appropriate or implement safety measures to protect those who are able to travel to court in person, to ensure that alleged serious violations of rights continue to be heard. To challenge any Covid-19 restrictions before the ECtHR it remained necessary during the pandemic to first exhaust domestic remedies.[738] This renders the continued operation of domestic courts during the pandemic yet more necessary, to ensure that limits on their capacity to examine complaints during a time of emergency do not hinder an individual's ability to bring a case at both the domestic and the European level.

Reports suggest that substantial judicial scrutiny during the pandemic was more common and effective in countries where courts of first instance are more easily accessible, and where there is a specific judicial circuit specialised in reviewing the

not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

[736] For example, a Brussels court ruled on 31 March 2021, that the Belgian Government must lift "all coronavirus measures" within 30 days, because the ministerial decrees used to introduce such measures lacked any legal basis and were introduced without input from parliament. The judge gave the State 30 days to provide a sound legal basis or face a penalty of €5,000 per day See "*Judge: Belgium must cancel corona rules in 30 days*", 31 March 2021, at https://euobserver.com/tickers/151420; see also "La protection des droits fondamentaux devant la Cour constitutionnelle fédérale d'Allemagne pendant la crise du Covid-19", Club des juristes, 8 mai 2020 details how several actions for interim measures were brought before the Federal Constitutional Court of Germany throughout the pandemic and helped to maintain effective judicial protection.

[737] The difficulties ensuring quick and effective access to justice in the courts during the pandemic are discussed in detail in the section on Article 6 (Right to a fair hearing) in Chapter I within this publication.

[738] *Zambrano v. France*¸ decision of 7 October 2021, no. 41994/21, where the application was declared inadmissible because the applicant had not submitted an appeal to the French administrative court and was therefore found not to have exhausted domestic remedies. See also: *Thevenon v. France*, decision of 13 September 2022, no. 46061/21

acts of public authorities.[739] For example, in France, the procedure of bringing a "référé-liberté" proved an effective means of ensuring effective judicial scrutiny to prevent infringements with human rights during the pandemic.[740] The procedure enables any citizen to bring an appeal before an administrative tribunal using an accelerated procedure when a measure is argued to breach their fundamental rights. The decision of the court of first instance can then be appealed before the Conseil d'Etat. The Conseil d'Etat operated without interruption and was regularly called upon to assess the constitutionality of measures adopted in response to the pandemic. Between March 2020 to March 2021, 647 applications relating to the pandemic were decided in urgent proceedings and the Conseil d'État ordered measures or suspended acts by the Government and the authorities in 51 cases.[741]

The following further examples of judicial scrutiny during the pandemic exemplify how the principles of legality and proportionality can be used to hold governments to account, even during an emergency or crisis situation:

i) The Bosnian Constitutional Court's decision of 22 April 2020[742] that the ban on minors and people over 65 from leaving their homes breached their right to freedom of movement, because the restrictions did not meet the criteria of proportionality, the authorities had not made clear why they estimated certain age groups had a larger risk of being infected or of transmitting the infection, the possibility of introducing lighter measures was not

[739] "Constitutions and Contagion. European Constitutional Systems and the Covid-19 Pandemic", Angelo Jr Golia, Laura Hering, Carolyn Moser, Tom Sparks, MPIL Research Paper Series No. 2020-42

[740] https://www.europarl.europa.eu/RegData/etudes/STUD/2021/690624/EPRS_STU(2021)690624_FR.pdf "Droit d'exception, une perspective de droit comparé France : lois d'urgence pour faire face à l'é pidé mie de Covid-19", a study by the research service of the European Parliament, PE 690.624–May 2021 (updated 1 June 2021)

[741] For example, the Conseil d'Etat ordered the restarting of the registration of asylum applications (April), ceremonies in places of worship (May), demonstrations (June and July), ordered the provision of masks to inmates in a prison (May), limited the compulsory wearing of masks to areas at risk (September) suspended the requirement to show a medical condition, as a pre-condition to benefit from furlough measures (October) and videoconferencing during criminal trials (November and February). See: https://www.conseil-etat.fr/en/news/one-year-of-legal-proceedings-linked-to-covid-19: "A look in figures at the activity of France's Conseil d'État, the court responsible for urgent measures and freedoms", 21 April 2021

[742] See https://balkaninsight.com/2020/04/22/bosnia-court-rules-against-movement-curbs-on-minors-seniors/ "Bosnia court rules against movement curbs on minors, seniors" by N. Dervisbegovic, Balkan Insight, 22 April 2020.

considered, the measures were not strictly limited in time, and there was no obligation to regularly review their continued necessity.

ii) The Kosovo Constitutional Court's Decision of 23 March 2020[743] that certain prohibitions on movement were not prescribed by law as they did not comply with the constitutional requirement that the restriction of rights and freedoms can only be done through laws passed in the Assembly.

iii) The decision of the Giudice di Pace di Frosinone of 15 June 2020, n. 516, which declared the order of the Italian Council of Ministers of 31.01.2020 declaring a state of emergency contrary to the Italian Constitution.

iv) The order of the Strasbourg Administrative Tribunal on 20 May 2020 to suspend a decree of the City of Strasbourg obliging all persons older than 11 years' old to wear mask when walking in the city.[744] The Tribunal referred to Article 8 of the ECHR and to the principles of legitimate aim and proportionality, finding the measure was not justified by a compelling reason linked to local circumstances in Strasbourg. Based on the same principles on 2 September 2020, the Tribunal annulled the decree and invited the local authorities to amend it.

v) The decision of the French Constitutional Council on 29 January 2021 that the Government order permitting the automatic prolongation of pretrial detention was incompatible with Article 66 of the Constitution (the prohibition on arbitrary detention), quashing the order with immediate effect.[745] Additionally, on 15 January 2021, the Constitutional Council considered that the use of audio-visual telecommunication, to decide whether to extend pre-trial detention was unconstitutional, because the use of audio-visual telecommunications was not subject to any legal conditions or exceptions, or the requirement of the parties' consent.[746]

[743] KO54/20, Applicant: The President of the Republic of Kosovo, Constitutional Review of Decision No. 01/15 of the Government of the Republic of Kosovo, of 23 March 2020.

[744] See http://strasbourg.tribunal-administratif.fr/content/download/171091/1705849/version/1/file/2003058-1.pdf Ordonnance n°2003058 du 25 Mai 2020, Tribunal Administratif de Strasbourg.

[745] Decision n° 2020-878/879 QPC

[746] Decision of, no. 2020-872 QPC

The approach of the Bosnian court also reflects the relative areas of competence of the judiciary and the government during a crisis situation. The court did not completely annul the order in question. Instead, it demanded further justification and amendment of the measure to ensure it complied with the principles of legality and proportionality, but left the Bosnian Government to apply its policy expertise to decide exactly how this should be done, taking into account the requirements brought to its attention by the court. Similarly, in April 2020, the Slovenian Constitutional Court assessed if a government ordinance restricting freedom of movement and assembly was constitutional. The court found that the measures were not proportionate on the basis that they were imposed for an unlimited period of time. Rather than annulling the measures, the court ordered instead that they be subjected to a periodic proportionality review, at least every seven days, so the measures could only be extended if, in light of the circumstances and expert opinion, they continued to be deemed necessary to achieve the objectives pursued.[747]

c. Intra governmental control and independent ombudsperson(s)

Another way in which States could seek to ensure accountability during the pandemic was through the appointment of experts within government or external expert bodies to oversee and advise on executive action. An existing independent ombudsperson or existing human rights committees could be provided with the task of observing the emergency measures and flagging any potential human rights abuses.[748] Alternatively, States could create new task forces and roles for experts to advise on how to ensure compliance with human rights whilst implementing their response to the pandemic.

[747] Constitutional Court of the Republic of Slovenia (2020), Opravilna št. U-I-83/20, 16 April 2020

[748] For example, the various interventions of the French Ombudsperson "La Défenseure des droits" made to the French Parliament about the compatibility with human rights of various measures taken to respond to the pandemic, including the decision to prolong the state of emergency, the proportionality of the measures introduced to combat the pandemic and the restrictions imposed against non-vaccinated people https://www.defenseurdesdroits.fr/sites/default/files/rapport_annuel/ddd_rapport-annuel-2021_20220705.pdf See also, the decision of the Slovenian Human Rights Ombudsman that a person could not be penalised for failure to comply with a government decree ordering mandatory wearing of face masks in enclosed public spaces because the decree was not made on a legal basis which allowed for this: https://www.varuh-rs.si/en/news/news/ombudsman-says-failure-to-wear-mask-in-enclosed-spaces-cannot-be-penalised/

In South Africa, for example, former Constitutional Court judge Kate O'Regan was appointed as a Covid-19 designated judge to make recommendations to government ministries regarding the amendment or enforcement of the regulations to safeguard the right to privacy whilst ensuring the ability of the Department of Health to engage in contact tracing.[749] The issue of protecting data privacy is one area in which this may be particularly helpful, as technological knowledge may need to be combined with legal expertise to ensure any track and trace systems protect data privacy to the extent possible whilst also serving the aim of protecting public health.

Engagement with independent experts from diverse fields such as health, technology, transport, the economy etc. should help to guarantee compliance with the principles of legality and proportionality. Cooperation with experts helps to ensure decisions are scientifically led, and so serve the purpose for which they are introduced. Independent experts were also able to provide governments with a range of options regarding how to respond to the pandemic, rendering government better placed to choose the means of protecting health which had the least restrictive impact on other rights. Making the independent advice and input provided to governments available to the public can also force accountability where government decisions diverge from expert advice. In this situation, governments are likely to be subjected to heightened parliamentary and press scrutiny to justify their decisions to depart from expert advice and demonstrate the alternative basis on which their approach was taken, to ensure it is lawful and proportionate.[750]

[749] See https://www.law.ox.ac.uk/news/2020-04-06-kate-oregan-appointed-south-africas-covid-19-designated-judge "Kate O'Regan appointed South Africa's COVID-19 Designated Judge", Faculty of Law News, University of Oxford, 6 April 2020

[750] By contrast, see the example in England of professionals who disagree with the stance of the government being removed from public platforms: https://www.independent.co.uk/news/uk/politics/nurse-ruth-may-dropped-coronavirus-briefings-dominic-cummings-a9628681.html "England's chief nurse confirms she was 'dropped' from No 10 press conference after voicing Dominic Cummings criticism" by A. Cowburn, The Independent, 20 July 2020

Chapter IV - Conclusion

The threat to health posed by the Covid-19 pandemic, and the urgent measures that needed to be taken in response to this threat, gave rise to unprecedented challenges across a wide range of fields, including the protection of human rights. As the nature of the pandemic evolved, governments developed new measures and technologies to combat and contain its spread, including the development of vaccination, mass testing and contact tracing policies.

This publication does not, therefore, seek to cover every aspect of every right that was affected by the pandemic, or by government responses to it. Instead, it provides an overview of some of the key areas in which Convention rights have been affected by the pandemic and may continue to be affected by its ongoing impact and aftermath. It also provides examples of some of the key areas in which positive obligations on States to take action might have arisen under the Convention. It further analyses the manner in which general principles such as proportionality, subsidiarity and the margin of appreciation were applied by courts throughout the pandemic, to provide guidance on how they can and should be applied in other emergency situations going forward.

As we emerge from the pandemic, a number of judgments and decisions from the European and domestic courts have now been delivered on issues relating specifically to the pandemic. What is clear from the relevant jurisprudence of the Court analysed in this guide, is that the principles of legality and proportionality cannot be ignored in a crisis situation. Whilst the manner in which they are applied might be adjusted to take account of the exigencies of an emergency situation, they should remain central to any emergency response.

The Court acknowledges that the pandemic gave rise to complex questions concerning competing rights, and that States were required to take exceptional measures to respond to the pandemic. Certainly, the Court affords States a wider margin of appreciation in matters of emergency response and the development of health and economic policies. However, the Court has reinforced that this margin of appreciation is not unlimited. Despite the challenges posed by the pandemic, States remain under an obligation to make a careful assessment of their interference with the rights and freedoms of those within their jurisdiction

and to limit their impact on these rights only to the extent, and for only as long, as required by the exigencies of an emergency. This publication seeks to provide an overview of some of the key factors to consider when making such assessments and when deciding on the measures to take. Further, whilst parliamentary scrutiny might be limited during an emergency situation, independent and effective judicial scrutiny of emergency measures becomes yet more important. This publication seeks to show that States may have needed to be creative in their approach to enabling courts, legislatures and other institutions to continue to function during the pandemic, but that their continued operation was both possible, and essential. Going forward, such lessons learned will be relevant to future proofing judicial and legislative scrutiny in the context of other emergency situations.

Finally, we hope that this publication has demonstrated that the protection of human rights should not be viewed as an obstruction to the protection of health. On the contrary, the protection of rights requires the protection of health. Application of the principles of legality and proportionality can help to ensure measures taken to respond to the pandemic are efficient and effective in their goal of protecting health, without infringing other human rights to an unnecessary extent. The provisions of the Convention and the case law of the Court provide helpful guidance regarding the interests to be taken into account when deciphering how to respond to a crisis situation. They also provide useful frameworks within which to structure decisions that involve balancing complex and sometimes competing interests.

Certainly, the Covid-19 pandemic was an extraordinary situation, but that is no reason to disregard the requirements under the ECHR to safeguard human rights in line with the principles of legality and proportionality. Instead, it made their protection and application ever more essential.

PART 2

Case Summaries

I. Derogation and exceptional measures

Post 9/11 terrorist threats constituted "a public emergency threatening the life of the nation", but the derogation powers used under Article 15 were disproportionate and hence invalid as they unjustifiably discriminated against foreign nationals

1. GRAND CHAMBER JUDGMENT IN THE CASE OF A. AND OTHERS v. THE UNITED KINGDOM

(Application no. 3455/05)
19 February 2009

1. Principal facts

The case was brought by eleven applicants: six of Algerian nationality, four of French, Jordanian, Moroccan and Tunisian nationality respectively; and one stateless, having been born in a Palestinian refugee camp in Jordan.

The Government considered that the United Kingdom, given its close links with the United States of America, was particularly at threat from terrorist attacks following the events of 11 September 2001. As such, it declared a state of public emergency within the meaning of Article 15 § 1 of the Convention – 'derogation in time of emergency'.

The Government considered the terrorist threat emanated particularly from foreign nationals present in the United Kingdom, including the applicants, who were allegedly part of a support network for international organisations, such as al'Qaeda. The Government had the power to detain such persons on the grounds of national security under the Immigration Act 1971. However, this power could only be exercised if subsequent deportation was possible within a reasonable time, otherwise any detention would be considered unlawful.

Deportation, and therefore detention, of the applicants was not possible because they risked ill-treatment in their countries of origin amounting to a breach Article 3 of the Convention. Accordingly, Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act") came into force on 4 December 2001, following a notice of derogation under Article 15 in November 2001. This gave the Government power to detain foreign nationals certified by the Secretary of State as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom.

Between December 2001 and October 2003, all applicants were detained under the 2001 Act, initially at Belmarsh Prison in London. Two applicants were released as they elected to leave the United Kingdom. Three were transferred to Broadmoor Secure Mental Hospital following deterioration in their mental health, including one suicide attempt. Another was released under conditions equivalent to house arrest due to serious mental health concerns.

Each applicant appealed to the Special Immigration Appeals Commission (SIAC), against the Secretary of State's certification that they were "suspected international terrorists". The certification decision was upheld by SIAC on 30 July 2002. SIAC did find however that the detention regime breached the Convention as it only applied to foreign nationals and so was discriminatory.

The applicants also challenged the legality of the Government's derogation under Article 15. On 16 December 2004, the House of Lords held that there was an emergency threatening the life of the nation but that the detention scheme did not rationally address the threat to security and was therefore disproportionate. It found in particular that the detention scheme discriminated unjustifiability against foreign nationals. Therefore, it made a declaration of incompatibility under the Human Rights Act and quashed the derogation order.

2. Decision of the Court

The applicants complained their indefinite detention breached their Article 3 rights, and that they were denied an effective remedy for this in breach of Article 13. Furthermore, they argued their detention was discriminatory, as it only applied to foreign nationals, in breach of Articles 5 § 1 and 14. The applicants also contended that the SIAC appeals procedure breached Article 5 § 4. Lastly, they contended the above violations left them with no enforceable claim for compensation in national courts, violating their rights under Article 5 § 5.

Article 3 alone or in conjunction with Article 13

The Court noted that the applicants' indefinite detention was serious enough to affect their mental health. Despite this, the applicants had been able to, and were successful in, challenging the legality of the detention scheme under the SIAC appeal system. Moreover, each applicant had been able to bring an individual challenge to their certification, and it was required by statute for this to be reviewed every six months. Therefore, the Court stated their situation did not compare to an irreducible life sentence, capable of giving rise to an issue under Article 3.

Moreover, the applicants had domestic remedies at their disposal under administrative and civil law, which they did not attempt to use. Therefore, the Court could not examine the applicants' complaints about their detention conditions, as they did not comply with the requirement under Article 35 to exhaust domestic remedies. In addition, there was no breach of Article 13.

The Court therefore found no violation of Article 3, alone or in conjunction with Article 13.

Articles 5 § 1 and 15

The Court found no violation in respect of the Moroccan and French applicants, who had been detained for only short periods before electing to leave the United Kingdom. However, regarding the remaining nine applicants, the Court stated the Government's policy of keeping the possibility of their deportation "under active review" was insufficiently certain or determinative to amount to "action being taken with a view to deportation". Therefore, the applicants' detention did not fall within the exception to the right to liberty set out in Article 5 § 1(f).

Instead, the Court stated it was clear from the terms of the derogation notice and Part 4 of the 2001 Act that the detention was preventative: the applicants were certified and detained because they were suspected of being international terrorists, and because it was believed their presence in the United Kingdom threatened national security. Preventative detention without charge is incompatible with the fundamental right to liberty under Article 5 § 1 in the absence of a valid derogation under Article 15.

Therefore, the Court then went on to consider whether the Government's

derogation was valid. To do so, the Court first questioned whether there was a "public emergency threatening the life of the nation". It used previous case law to elucidate this threshold, noting the emergency should be "actual or imminent… affect the whole nation to the extent the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate"[751].

In considering imminence, the Court accepted the Government feared an al-Qaeda attack was imminent, despite one not yet having taken place within the United Kingdom at the time the derogation was made. Firstly, the requirement of imminence cannot be interpreted so narrowly as to require States to wait for disaster to strike before taking adequate measures. Secondly, since the very purpose of Article 15 is to protect the population from future risks, the Court stated the existence of a threat must be assessed primarily with reference to facts known to the Government at the time of the derogation, though the Court may also have regard to information that come to light subsequently. Applying these principles, the Court noted that the Secretary of State adduced evidence before domestic courts to show the existence of a threat of serious terrorist attacks against the United Kingdom, in addition to the closed evidence adduced before SIAC. All national judges had adduced this was credible, with one exception.

In considering the duration of the threat, the Court noted the United Nations Human Rights Committee observed that derogation measures must be of "an exceptional and temporary nature". However, the Court's case law had never, to date, required explicit incorporation of temporariness. Though, the Court noted that the duration of the emergency may instead be linked to proportionality of response, adding that public emergencies have previously been held to have existed for many years, referencing case examples from Northern Ireland.

In considering the nature of the threat, the Court dismissed the one dissenting view by a national judge that the threat had to extend to the institutions of the State. Rather, the Court noted that it had previously concluded emergencies where the State was not imperilled and, moreover, it had considered a much broader range of factors in assessing this threshold.

[751] *Denmark, Norway, Sweden and the Netherlands v. Greece*, nos.3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969.

Moreover, though the United Kingdom was the only Convention State to derogate in response to the danger from al-Qaeda, the Court applied a wide margin of appreciation to the Government's right, as the guardian of its own people's safety, to make its assessment on the basis of the facts known to it at the time. Therefore, the Court, like the House of Lords majority, accepted that there had been a state of public emergency.

The Court then moved on to consider whether the Government had derogated from its obligations under Article 5 § 1 only "to the extent strictly required by the exigencies of the situation" as provided by Article 15.

Firstly, the Court considered the Government's claim that the House of Lords had given inadequate weight to the views of the executive and parliament. National authorities are granted a wide margin of appreciation to decide on the nature and scope of derogating measures. Despite this, it is ultimately for the Court to rule whether such measures were "strictly required". In doing so, the Court must be satisfied that: it was a genuine response to the emergency situation, it was fully justified by the special circumstances of the emergency and adequate safeguards were provided against abuse. However, the Court emphasised the same margin of appreciation does not apply at the State level, where the question of proportionality is ultimately a decision for national courts, particularly where right to liberty has been deprived for such a long period of time. Therefore, taking into account the careful way in which the House of Lords approached the issues, the Court dismissed the Government's claim that the House had given inadequate weight to the views of the executive and parliament.

Secondly, the Court dismissed the Government's claim that the House's examination of the legislation was too abstract, noting the approach under Article 15 is necessarily focused on the general situation pertaining in the country concerned. As such, the Court emphasised that both international and national courts are required to examine the derogation measures in question and weigh them against the nature of the emergency threat. If this results in a disproportionate and discriminatory finding, as was the case here, there is no need to go further and examine each applicant's specific case.

Thirdly, the Court agreed with the House of Lords that the detention scheme was not an immigration measure, where distinction on the basis of nationality would be legitimate, but instead was a measure concerned with national security.

Fourthly, the Court stated the Government had not provided evidence to substantiate its claim that British Muslims would be significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims with suspected terrorist links.

Fifthly, the Court was unconvinced that the threat from non-nationals was significantly more serious than that from nationals, given national courts, including SIAC, saw both open and closed information and were not convinced of this disparity.

Therefore, the Court found the derogation was disproportionate as it discriminated unjustifiably between nationals and non-nationals. It followed that there was a violation of Article 5 § 1 in respect of the remaining nine applicants.

Article 5 § 4

The Court declared inadmissible the complaints of the two applicants who had elected to leave the United Kingdom. The remaining applicants complained the SIAC appeal procedure was unfair as the evidence against them was not fully disclosed.

The Court affirmed SIAC was best placed to ensure no material was unnecessarily withheld from the applicants, further noting the need for secrecy was justified by the public emergency. Where the open material consisted only of general assertions, the procedural requirements of Article 5 § 4 would not be satisfied, as this would make it impossible for the applicants to provide information to refute the arguments laid against them.

Accordingly, the Court found a violation of Article 5 § 4 in respect of four applicants, as the open allegations were too general in nature, depriving them of their position to effectively challenge the evidence against them.

Article 5 § 5

The Court found a violation of Article 5 § 5 as the above violations could not give rise to an enforceable claim for compensation in national courts. This applied in respect of all applicants except the two who had elected to leave the United Kingdom.

Article 41

In respect of non-pecuniary damage, the Court awarded to the six Algerian applicants €3,400, €3,900, €3,800, €3,400, €2,500 and €1,700, respectively; to the stateless and Tunisian applicants €3,900, each; and to the Jordanian applicant, €2,800. The applicants were jointly awarded €60,000 for legal costs.

The Court stated these awards were substantially lower than those which it had made in past cases of unlawful detention. This was in view of the fact that the detention scheme was devised in the face of a public emergency, and as an attempt to reconcile the need to protect the United Kingdom public against terrorism with the obligation not to send the applicants back to countries where they faced a real risk of ill-treatment.

Though terrorist activity in Turkey was an accepted public emergency, the 14-day incommunicado detention of the applicant without access to a judge was not strictly required by that emergency and hence constituted a violation of Article 5

2. JUDGMENT IN THE CASE OF AKSOY v. TURKEY

(Application no. 21987/93)
18 December 1996

1. Principal facts

For approximately 11 years preceding this judgment, there had been serious disturbances in Turkey between security forces and the PKK (Workers' Party of Kurdistan). According to the Government, this had claimed the lives of almost 8,000 individuals. At the time of the Court's judgment, ten of the eleven provinces in South-East Turkey had been under emergency rule since 1987. In August 1990, the Government proclaimed a derogation under Article 15 of the Convention due to terrorist activity, modified four months later to only apply to Article 5.

The facts were disputed between the parties. The applicant alleged that, in November 1992, he was taken into custody by twenty policemen after he had been identified as a member of the PKK by another detainee. However, the Government alleged that the applicant was taken into custody with thirteen others on suspicion of aiding and abetting PKK terrorists.

The applicant claimed he was detained with two others in a small cell, with one bed and provided two meals per day. He claimed he was threatened with torture whilst being interrogated and was subsequently strung up by his arms in a form of torture known as "Palestinian hanging", where the police connected electrodes to his genitals and threw water over him. The torture allegedly lasted for four days and he claimed he lost movement of his arms and hands as a result. He was refused permission to see a doctor immediately, though saw one several days later. The doctor's report stated that the applicant bore no traces of violence, though the applicant claimed the doctor asked how his arms had been injured.

The Government submitted there were doubts as to the applicant being ill-treated in custody and that, shortly before his release he was brought before the public prosecutor, signed a statement denying involvement with the PKK, and made no complaint about having been tortured. The applicant claimed he was

shown a false statement, which the prosecutor insisted he sign, but could not because his hands were immobile.

The applicant was released on 10 December 1992 and was admitted to hospital five days later where he was diagnosed with bilateral radial paralysis. He remained there until 31 December 1992, when the Government claimed he left without having been properly discharged, taking his medical file with him.

Meanwhile, the public prosecutor decided that there were no grounds to institute criminal proceedings against the applicant. No criminal or civil proceedings have been brought in domestic courts in relation to alleged ill-treatment of the applicant.

The applicant was shot and killed on 16 April 1994. Since then, his father indicated his wish to pursue the case. It was alleged his death was a direct result of his persistence with his application under the Convention, despite being threatened with death to withdraw it. However, the Government submitted his death was a settling of scores between PKK factions and an alleged member of the PKK had been charged with the murder.

2. Decision of the Court

The applicant complained he was subjected to ill-treatment contrary to Article 3 and his detention breached his right to be brought promptly before a judge under Article 5. He also complained he was denied access to a court and effective remedy, both of which the Court examined under Article 13. The applicant's death was complained of as an interference with the right to individual petition under Article 25 (now Article 34). The case was examined before the introduction of Protocol 11 in 1998, meaning the Commission carried out a fact-finding role and gave its opinion before the Court examined the case.

Article 3

The Commission had concluded that the applicant had been tortured. The Court, having decided to accept the Commission's findings of fact, considered that, where an individual was taken into custody in good health, but then found to be injured at the time of release, it was incumbent on the State to provide a plausible explanation for the cause of injury. Failure to do so raised issues under Article 3.

The Court reiterated that Article 3 enshrined one of the fundamental values of democratic society and, therefore, no derogation from it was permissible under Article 15, even in the event of a public emergency.

The definition of torture was reiterated as "deliberate inhumane treatment causing very serious and cruel suffering". The Commission had accepted the applicant was subjected to a "Palestinian hanging", which the Court viewed could only have been inflicted deliberately because preparation and exertion were required to carry it out. Moreover, the medical evidence showed that it led to paralysis of both arms which lasted a substantial time. This treatment was of such a serious and cruel nature that it could only be described as torture. Hence there had been a violation of Article 3.

Article 5

The Court first examined the derogation to Article 5 proclaimed by the Government. It reiterated that States are responsible for determining whether citizens' lives are threatened by a "public emergency" and if so, how far it is necessary to go in attempting to overcome that emergency. Therefore, States have a wide margin of appreciation, supervised by the Court, to assess whether measures have gone beyond the "extent strictly required by the exigencies of the situation".

It was accepted that such a "public emergency" existed given the extent and impact of PKK terrorist activity in South-East Turkey, so the Court then moved on to examine whether the measures were strictly required by the exigencies of the situation.

The applicant had been held for at least fourteen days without being brought before a judge, in accordance with Turkish law, which allowed a person detained in connection with a collective offence to be held for up to thirty days during a public emergency. It was accepted that the investigation of terrorist offences presented authorities with special problems, but the Court could not accept that it was therefore necessary to hold the applicant for fourteen days without judicial intervention. This period was exceptionally long and left the applicant vulnerable to both arbitrary interference with his right to liberty and torture. Moreover, the Government had not adduced any detailed reasons as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable. Insufficient safeguards were available to the applicant. In particular, denial of

access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant he was at the mercy of those holding him.

Given the impugned measure was not strictly required by the exigencies of the situation, the Court found it unnecessary to rule as to whether the derogation met the formal requirements of Article 15. Hence there had been a violation of Article 5.

Article 13

The public prosecutor chose to make no enquiry as to the nature, extent and cause of the applicant's injuries despite the fact that they were clearly visible in their meeting, and in Turkish law he was under a duty to investigate. Given this, it was understandable if the applicant formed the belief that he could not gain a remedy through national legal channels. It was therefore concluded that there existed special circumstances which absolved the applicant from his obligation to exhaust domestic remedies.

In instances of torture allegations, an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.

Allegations of torture in custody are very difficult to substantiate if the applicant has been isolated from the outside world without access to doctors, lawyers, family or friends to provide support and assemble evidence. Moreover in the present case given the applicant's injuries, his capacity to pursue a complaint would likely have been impaired.

The prosecutor ignored the visible evidence before him, and no evidence was adduced to show any other action was taken. The Court viewed these actions tantamount to undermining the effectiveness of any other remedies that may have existed and therefore found the applicant was denied an effective remedy in respect of his allegation of torture. Hence, there had been a violation of Article 13.

Article 25 (now Article 34)

The importance of free communication with the Strasbourg institutions, without pressure from authorities, was reiterated. However, there was no evidence to demonstrate that the applicant's death was connected with his application, or that State authorities had been responsible for any interference in the form of threats or intimidation. Therefore, the Court could not find that there had been a violation of Article 25.

Article 50 (now Article 41)

The Court held that Turkey was to pay the applicant's father 4,283,450,000 Turkish liras in respect of compensation for pecuniary and non-pecuniary damages, and £20,710 in respect of costs and expenses.

Government's derogation in relation to terrorist activity in Northern Ireland satisfied the requirements of Article 15 as it was limited in scope, there were basic safeguards in place against its abuse and it was strictly required by the exigencies of the situation

3. JUDGMENT IN THE CASE OF BRANNIGAN AND McBRIDE v. THE UNITED KINGDOM

(Application nos. 14553/89 and 14554/89)
25 May 1993

1. Principal facts

On 22 December 1988 the Secretary of State declared a public emergency as a result of terrorist activity in Northern Ireland, stating the police needed to be able to detain terrorist suspects without charge or trial for up to seven days.

The two applicants were each arrested at their own homes on, respectively, 9 January and 5 January 1989 pursuant to Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 ('the Act'), which permitted arrest without warrant where there were reasonable grounds for suspected involvement in terrorism. The first applicant was detained for six days, fourteen hours and thirty minutes and the second applicant for four days, six hours and twenty-five minutes. For the duration, both applicants were denied access to all written materials, radio and TV, and banned from associating with other prisoners. Both were subjected to numerous interrogations, forty-three and twenty-two times respectively, and visits from medical practitioners, seventeen and eight times respectively. The first was denied access to a solicitor for the first forty-eight hours of his detention.

The second applicant was shot dead on 4 February 1992 by a policeman who had attacked Sinn Fein Headquarters in Belfast.

2. Decision of the Court

The applicants complained their detention breached their right to be brought promptly before a judge, under Article 5 § 3 and § 5. They further complained they had no effective remedy as required under Article 13, and that the United Kingdom's derogation under Article 15 was invalid.

Article 5

The Court reiterated that States are responsible for determining whether citizens' lives are threatened by a "public emergency", and if so, how far it is necessary to go in attempting to overcome that emergency. Therefore, States have a wide margin of appreciation, supervised by the Court, to assess whether measures have gone beyond the "extent strictly required by the exigencies of the situation". It was considered that, given the extent and impact of terrorist violence in Northern Ireland, there was no doubt that a public emergency existed at the relevant time.

It was observed that the powers of arrest and extended detention had been considered necessary by the Government since 1974 in dealing with the terrorist threat. Following a similar case[752], where the Government was found to be in breach of obligations under Article 5, the Court noted the Government could either introduce judicial control of detention under the Act or lodge a derogation in this respect. The Government viewed the former infeasible due to difficulties associated with the investigation and prosecution of terrorist crime, making derogation inevitable. Therefore, the derogation was clearly a genuine response to the persistence of the emergency situation.

It was reiterated that it was not the Court's role to substitute its view as to what measures were most appropriate at the relevant time for that of the Government. As the judiciary in Northern Ireland was small and vulnerable to terrorist attacks, its independence was regarded as particularly important by the Government. Reports on Prevention of Terrorism legislation noted that difficulties in investigating and prosecuting terrorist crime gave rise to the need for an extended period of detention which would not be subject to judicial control. The Government argued that it was essential to prevent the disclosure of information on the basis of which decisions of extended detention were made to the detainee and his legal adviser. The independence of the judiciary would also be compromised if judges were involved in granting extensions. It was also noted that Article 5 requires a procedure to have judicial character, though the process need not be identical in every case where judicial intervention is required.

[752] *Brogan and Others v. United Kingdom*, judgment of 19 November 1988, nos. 11209/84; 11234/84; 11266/84; 11386/85.

The Court stated there were sufficient safeguards against the abuse of the detention power. Firstly, the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention. There was no dispute that this remedy was open to the applicants had they chosen to use it. Secondly, detainees had an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. The decision to delay access was susceptible to judicial review and the burden for establishing reasonable grounds for doing so rested on the authorities. It was also not disputed that detainees were entitled to inform a relative or friend about their detention and have access to a doctor. Moreover, it was noted the operation of the Act had been kept under regular independent review and, until 1989, was subjected to regular renewal.

The Court concluded the Government had not exceeded its margin of appreciation in deciding that the derogation was strictly required by the exigencies of the situation.

The Government's derogation notice to the Council of Europe under Article 15 on 23 December 1988 following the state of emergency was considered formal in character, made public its intentions and was in-keeping with the notion of an official proclamation. Therefore, it was considered there was no basis for the applicants' argument that the derogation had not been "officially proclaimed" within the meaning of Article 4 of the 1966 United Nations International Covenant on Civil and Political Rights.

In conclusion, it was held that the United Kingdom's derogation satisfied the requirements of Article 15 and that therefore the applicants could not validly complain their rights were violated under Article 5.

Article 13

It was reiterated that the applicants could have challenged the lawfulness of their detention by *habeus corpus*, which had previously been held to satisfy Article 5 § 4. Since the requirements of Article 13 were less strict that Article 5 § 4, it was held there had been no breach of this provision.

Complaint regarding public servants' reduction in wages and pensions in response to Greece's financial crisis declared inadmissible, where it was in the public interest and did not cause subsistence difficulties incompatible with Article 1 of Protocol No.1

4. DECISION IN THE CASE OF KOUFAKI AND ADEDY v. GREECE

(Application nos. 57665/12 and 57657/12)
7 May 2013

1. Principal facts

In reaction to Greece's financial crisis in 2010, the Government implemented austerity measures which included the reduction in remuneration, benefits, bonuses and pensions of public servants with the aim of reducing public spending.

The first applicant worked for the Greek Ombudsman's Office and the second, the Public Service Trade Union Confederation, was a trade union organisation which represented several public sector workers.

In July 2010, both applicants took their matters to the Supreme Administrative Court seeking judicial review: the first, in relation to a reduction in her pay statement, and the second, due to the effects of austerity on its members. On 20 February 2012, the Supreme Administrative Court rejected their applications.

2. Decision of the Court

The applicants complained cuts in wages and pensions amounted to a deprivation of their possessions as protected under Article 1 of Protocol No. 1.

Article 1 of Protocol No.1

The Court considered the restrictions introduced should not be considered as a "deprivation of possessions", as the applicants claimed, but rather as an interference with the right to the peaceful enjoyment of possessions, provided for by domestic law.

It was reiterated that States enjoy quite a wide margin of appreciation in regulating their social policy. The requirements of Article 1 of Protocol No. 1

are that any interference by a public authority with the peaceful enjoyment of possessions should be: lawful, pursue a legitimate aim "in the public interest" and be reasonably proportionate to the aim sought.

Public interest was given an extensive definition and the Court reiterated that it would respect the Government's judgment as to what that interest constituted unless it was manifestly without reasonable foundation. The Government had justified the impugned measures by the unprecedented national crisis, and the measures formed part of a wider austerity programme aimed at improving Greece's financial prospects. This aim was therefore in the general national interest and coincided with the interests of the eurozone members, who were obliged to observe budgetary discipline. Therefore, the Court had no reasons to doubt that the measures were in the public interest.

Two consecutive laws applied to all public servants indiscriminately, providing for a 20% reduction in their salaries and pensions as well as reductions in other allowances and benefits. The measures introduced by the second law were considered necessary by the Government because those taken under the first law had proved insufficient to resolve the country's economic predicament.

The Court attached particular weight to the reasons given by the Supreme Administrative Court which, in its judgment of 20 February 2012, dismissed several arguments which suggested the measures had breached the proportionality principle. In particular, it held that the fact wage and pension cuts were not merely temporary, was justified since the Government's aim had been not only to remedy the immediate budgetary crisis, but also to consolidate the State's finances in the long term. It further observed that the applicants before it had not claimed specifically that their situation had worsened to the extent that they risked falling below the subsistence threshold.

Regarding the first applicant, the Court considered that her monthly salary reduction, from €2,435.83 to €1,885.79, did not risk exposing her to subsistence difficulties incompatible with Article 1 of Protocol No. 1. Taking into account the dire economic climate, the interference could not be said to have placed an excessive burden on her.

Regarding the second applicant, the removal of parts of pension payments was compensated for, in the case of persons receiving less than €2,500 per month, by the introduction of a bonus of €800 per year. Furthermore, an annual bonus

of €1,000 was introduced, funded by the reduction in the allowances previously payable to higher earners, with the aim of protecting those in the lowest income segments. In regard to alternative solutions, their possible existence was not considered to render the contested legislation unjustified. As long as the domestic authorities did not overstep the limits of their margin of appreciation, the Court reiterated it was not its place to hold whether the Government had chosen the best means of addressing the problem, or whether it could have used its power differently.

Therefore, the Court declared the applications inadmissible.

The threat of terrorist activity constituted a public emergency threatening the life of the nation which ordinary legislation was insufficient to combat, thereby justifying a derogation from the European Convention on Human Rights under Article 15

5. JUDGMENT IN THE CASE OF LAWLESS v. IRELAND (No. 3)

(Application no. 332/57)
1 July 1961

1. Principal facts

In 1939, the Irish Republican Army (IRA) launched its 'Sabotage Campaign'. In response, the Irish Government secured detention without charge or trial under the Offences Against the State (Amendment) Act 1940 ('the Act'). During 1956 and 1957 there was a renewed outbreak of IRA violence, which led to the Government declaring a state of public emergency on 5 July 1957, bringing the detention powers under the Act into force.

The applicant was an Irish national and was arrested on 11 July 1957 for being a member of the IRA, which was an illegal organisation. He was detained without charge or trial but was offered release in exchange for an undertaking to observe the law and refrain from activities contrary to the Act, which he refused. He was eventually released five months later after providing a similar verbal undertaking.

Meanwhile, the Irish High Court denied his petition for a writ of habeas corpus, which was affirmed by the Supreme Court of Ireland on 6 November 1957.

2. Decision of the Court

The applicant complained that, in arresting him without charge or trial, the Government had violated his rights to liberty and fair trial under Articles 5 and 6. As the Court acknowledged the applicant's detention violated his rights under Article 5, it sought to examine whether the detention was justified under Article 15.

Article 15

The Court stated a 'public emergency threatening the life of the nation' should be given its customary meaning: "an exceptional situation of crisis or emergency

which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".

It concluded the definition was met because the IRA was a live, secret and unconstitutional organisation that used violence to achieve its aims, operating outside the State and therefore jeopardising its relations with neighbours. Its terrorist activity had also increased at a steady and alarming rate between 1956 and 1957. Though the Government had previously succeeded in using ordinary legislation to preserve peace, it was emphasised the terrorist incidents on 3 – 4 July 1957 heightened imminent dangers.

It was further concluded that detention without trial was strictly required by the exigencies of the situation because of the IRA's military, secret and terrorist character; the fact ordinary law and special military courts had proved insufficient to restore peace and order; and the difficultly in amassing the necessary evidence to convict its members, particularly as it mainly operated in Northern Ireland. The Act was also subjected to safeguards to prevent its abuse. These included constant supervision by Parliament, a Detention Commission which considered applications for release from detainees under the Act and the offering of an undertaking to abide by the law in general, and the Act specifically, in exchange for release.

The Court noted no facts had come to its knowledge which suggested the derogation was inconsistent with other obligations under international law.

Moreover, it stated that the notification requirements under Article 15 should usually be met without delay by a written letter to the Secretary General of the Council of Europe, with attached copies of the legal texts under which the emergency measures were taken, including an explanation of their purpose. It was confirmed the actions of the Government were sufficient: a letter sent on 20 July 1957, with attached copies of the Act, the 5 July Proclamation and an explanation that the measures had been taken to protect public peace and order. A notification period of twelve days after the derogation measures came into force was held sufficiently prompt. It was highlighted that there is no specification under Article 15 that a State must share with the public the derogation notice addressed to the Secretary General.

The unlawful pre-trial detention of a journalist was not strictly required by the public emergency in place following a military coup, and violated Articles 5, 6 and 10, with the Court ordering the applicant's release under Article 46

6. JUDGMENT IN THE CASE OF ŞAHIN ALPAY v. TURKEY

(Application no. 16538/17)
20 March 2018

1. Principal facts

On 20 July 2016, the Government declared a state of emergency following a military coup attempt, which led to over 300 deaths. It blamed a Turkish citizen residing in the United States, considered to be the leader of the FETÖ/PDY ("Gülenist Terror Organisation/Parallel State Structure") for leading the coup attempt. The following day, the Government gave notice to the Council of Europe of a derogation under Article 15 of the Convention.

The applicant was a Turkish national and journalist who worked for a daily newspaper, Zaman, which was closed down following Legislative Decree no. 688 issued on 27 July 2016 in connection with the proclaimed state of emergency. He also lectured on Turkish political history and comparative politics at a university in Istanbul. In the years leading up to the attempted coup, the applicant had been known for his critical views of the serving government's policies.

On 27 July 2016, he was arrested at his home and taken into police custody on suspicion of being a member of the terrorist organisation FETÖ/PDY. He was placed in pre-trial detention on the grounds that his articles had promoted FETÖ/PDY and his applications for release were rejected. In September 2016, he lodged an individual application with the Constitutional Court.

In April 2017, the Istanbul public prosecutor filed an indictment in respect of several individuals suspected of being part of the FETÖ/PDY media wing, including the applicant, in particular accusing them, under Turkey's Criminal Code, of attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the government by force and violence, and of committing offences on behalf of a terrorist organisation without being members of it.

On 11 January 2018, the Constitutional Court held there had been a violation of the right to liberty and security and right to freedom of expression and of the press. However, the Istanbul Assize Court rejected the applicant's application for release.

At the time of this judgment, the applicant was still in detention with criminal proceedings pending against him.

2. Decision of the Court

The applicant complained, under Articles 5 § 1 and 5 § 3, that his initial pre-trial detention and its continuation were arbitrary as there was no evidence upon which to ground the suspicion he had committed a criminal offence. He further complained the Constitutional Court failed to observe the requirement of "speediness" and that he had not had access to an effective remedy, under Articles 5 § 4 and 5 § 5 respectively. He also complained, under Articles 10 and 18 respectively, of a breach of his right to freedom of expression and alleged he had been detained for expressing critical opinions about government authorities.

Article 5 § 1

The Court reiterated that the rights guaranteed by Article 5 are of primary importance in a democratic society, and that a person may be detained under Article 5 § 1 (c) only in the context of criminal proceedings for the purpose of bringing them before a competent legal authority on "reasonable" suspicion of having committed an offence. This threshold presupposes the existence of information which would satisfy an objective observer that the person concerned may have committed the offence, though this will depend upon all the circumstances of the case. It was reiterated the Court does not usually substitute its own assessment of the facts for that of domestic courts.

In its judgment of 11 January 2018, the Constitutional Court established the applicant had been placed and kept in pre-trial detention in breach of Article 19 § 3 of the Constitution, holding that the authorities were unable to demonstrate any factual basis that might indicate that he had been acting in accordance with the aims of FETÖ/PDY. On the basis of the evidence presented by the prosecution, the Constitutional Court held that there were no strong indications that the applicant had committed the offences with which he was charged. With regards to the application of Article 15 of the Turkish Constitution (which provided for

the suspension of the exercise of fundamental rights and freedoms in the event of a state of emergency), it concluded the right to liberty and security would be meaningless if it were accepted people could be placed in pre-trial detention without any strong evidence they had committed a criminal offence. In the Constitutional Court's view, the applicant's deprivation of liberty was therefore disproportionate to the strict exigencies of the situation. The Court endorsed this finding, limiting its scrutiny to the determination as to whether national authorities afforded sufficient redress for the violation.

Although the Constitutional Court had found a violation of the Constitution, the Istanbul 13th and 14th Assize Courts refused to release the applicant, finding the judgment was not in compliance with the law and amounted to a usurpation of power. The Court did not accept the 13th Assize Court's argument that the Constitutional Court had no jurisdiction to assess the evidence in the case file. To do otherwise would amount to maintaining that the Constitutional Court could have examined the applicant's complaint without considering the substance of the evidence produced against him. Moreover, taking into account the binding nature of the Constitutional Court's decisions in accordance with the Constitution, the Court found there was no cause to doubt that judgments in which the Constitutional Court found a violation would be effectively implemented.

The Court further observed that, prior to the Constitutional Court's judgment, the Government had explicitly urged the Court to reject the applicant's application for failure to exhaust domestic remedies on the grounds that his individual application to the Constitutional Court was still pending. This was reinforced by the Government's view that an individual application to the Constitutional Court was an effective remedy for the purposes of Article 5 of the Convention. The Court considered this could only be interpreted to mean that, under Turkish law, if the Constitutional Court had ruled that the applicant's pre-trial detention was in breach of the Constitution, the response by the appropriate courts to rule on pre-trial detention must necessarily entail releasing him, unless new grounds and evidence justifying his continued detention were put forward. Therefore, the 13th Assize Court's dismissal of the application for release departed from the approach indicated by the Government before the Court.

The Court observed that the reasons given by the 13th Assize Court in rejecting the application for the applicant's release, following a "final" and "binding" judgment delivered by the supreme constitutional judicial authority, could not be regarded as satisfying the requirements of Article 5 § 1 of the Convention. For

another court to call into question the powers conferred on a constitutional court to give final and binding judgments on individual applications runs counter to its fundamental principles of the rule of law and legal certainty. The Court reiterated that these principles are the cornerstones of the guarantees against arbitrariness. It further observed that the case file disclosed no new grounds or evidence showing the basis for the detention changed following the Constitutional Court's judgment. Accordingly, the applicant's continued pre-trial detention could not be regarded as "lawful" and "in accordance with the procedure prescribed by law" as required by the Convention.

The Court then moved on to examine the derogation and accepted that the notice satisfied the formal requirements laid down in Article 15 of the Convention. It observed that the Constitutional Court, having examined from a constitutional perspective the facts leading to the declaration of a state of emergency, concluded that the attempted military coup had posed a severe threat to the life and existence of the nation. In light of the Constitutional Court's findings and all the other material available to it, the Court likewise considered that the attempted military coup had disclosed the existence of a "public emergency" within the meaning of the Convention.

As to whether the measures taken in the present case had been strictly required by the exigencies of the situation, the Court considered, having regard to Article 15 and the derogation, that, as the Constitutional Court had found, a measure entailing pre-trial detention that was not "lawful" and had not been effected "in accordance with a procedure prescribed by law" on account of the lack of reasonable suspicion could not be said to have been strictly required by the situation.

Therefore, the Court held there was a violation of Article 5 § 1. It further emphasised that the applicant's continued pre-trial detention, even after the Constitutional Court's judgment, as a result of the decisions delivered by the 13th Assize Court, raised serious doubts as to the effectiveness of the remedy of an individual application to the Constitutional Court in cases concerning pre-trial detention. However, as matters stood, the Court did not depart from its previous finding that the right to lodge an individual application with the Constitutional Court constituted an effective remedy in respect of complaints by persons deprived of their liberty under Article 19 of the Constitution. Nevertheless, it reserved the right to examine the effectiveness of the system of individual applications to the Constitutional Court in relation to applications under Article 5 of the Convention, especially in view of any subsequent developments in the case-law of the

first-instance courts, particularly the assize courts, regarding the authority of the Constitutional Court's judgments. In that regard, it would be for the Government to prove that this remedy was effective, both in theory and in practice.

In view of the above, the Court held it unnecessary to examine this complaint under Article 5 § 3.

Article 5 § 4

It was reiterated that the threshold required for a "speedy" judicial decision must be determined in light of the circumstances, including the: complexity of proceedings, conduct by domestic authorities and the applicant, and what was at stake for the latter. Moreover, where the original detention order or subsequent orders on continued detention were given by a court which guaranteed due process, and where the domestic law provided for an appeal system, the Court was prepared to tolerate longer periods of review.

The Court considered that the duration of 16 months and three days before the Constitutional Court would not ordinarily be described as "speedy". However, the instant case was a complex one, being one of the first to raise new and complicated issues regarding rights to liberty and security under a state of emergency. Moreover, the Constitutional Court had an exceptionally heavy caseload at the relevant time. Therefore, the Court held there was no violation of Article 5 § 4.

It however reiterated that the Constitutional Court did not have a carte blanche when dealing with similar complaints and the Court retained its supervisory jurisdiction.

Article 5 § 5

The Court unanimously declared this complaint inadmissible, finding that it was manifestly ill- founded in so far as it concerned Article 5 § 1 of the Convention, and incompatible *ratione materiae* in so far as it concerned Article 5 § 4.

Article 10

The Court considered, in the light of the Constitutional Court's judgment, that the applicant's pre-trial detention constituted an "interference" with his right to freedom of expression.

The detention had an undisputed legal basis in the relevant provisions of the Criminal Code and the Code of Criminal Procedure, and it had pursued the legitimate aims of preventing disorder and crime. However, the Court could see no reason to reach a different conclusion from the Constitutional Court, which had found that the applicant's initial and continued pre-trial detention, following the expression of his opinions, had constituted a severe measure that could not be regarded as a necessary and proportionate interference in a democratic society for the purposes of Articles 26 and 28 of the Constitution. Finding that the judges concerned had not shown that depriving the applicant of his liberty had met a pressing social need, the Constitutional Court held that in so far as his detention had not been based on any concrete evidence other than his articles, it could have had a chilling effect on freedom of expression and of the press.

The Court noted the coup attempt and other terrorist acts clearly posed a major threat to democracy in Turkey. However, it considered that one of the principal characteristics of democracy is the possibility of resolving problems through public debate. Therefore, the existence of a "public emergency" must not serve as a pretext for limiting this freedom, which is at the very core of democratic society. It was considered that, even in a state of emergency, States must ensure protection of the democratic order, safeguarding its values of pluralism, tolerance and broadmindedness.

In this context, the Court considered that criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings. Should this not be the case, the national courts' interpretation cannot be regarded as acceptable.

With regard to the derogation by Turkey, in the absence of any strong reasons to depart from its assessment concerning the application of Article 15 in relation to Article 5 § 1 of the Convention, the Court found that its conclusions were also valid in the context of its examination under Article 10.

Article 18

Having regard to all the conclusions it had reached under Article 5 § 1 and Article 10 of the Convention, the Court did not consider it necessary to examine this complaint separately.

Article 46

The Court found that any continuation of the applicant's pre-trial detention would entail a prolongation of the violation of Article 5 § 1 and a breach of the obligations on States to abide by the Court's judgment in accordance with Article 46 of the Convention. Accordingly, the Court held that it was incumbent on the Government to ensure the termination of the applicant's pre-trial detention at the earliest possible date.

Article 41

The Court held Turkey was to pay the applicant €21,500 in respect of non-pecuniary damages.

II. Positive obligations protecting life and health including in detention premises

Positive obligations of the State to safeguard the right to life and property in connection with environmental disasters

7. JUDGMENT IN THE CASE OF BUDAYEVA AND OTHERS v. RUSSIA

(Application nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02)
20 March 2008

1. Principal facts

The six applicants were Russian nationals born between 1953 and 1961. They lived in the town of Tyrnauz, situated in the mountain district in the Republic of Kabardino-Balkariya (Russia). Mudslides had been recorded in the area every year since 1937, especially in summers.

On 18 July 2000 a flow of mud and debris hit the town of Tyrnauz and flooded part of the residential area. According to the applicants there was no advance warning and they all only just managed to escape. One of the applicants, Fatima Atmurzayeva, and her daughter, were caught in the mud and debris while trying to escape, and injured. They suffered severe friction burns. Once the mudslide struck, the alarm was raised through loudspeakers, but the applicants claimed that there were no rescue forces or any other emergency relief at the scene of the disaster.

In the morning of 19 July 2000 the mud level fell and, as there were no barriers, police or emergency officers to stop them, certain residents, among them applicant Khalimat Budayeva and her family, returned to their homes. They were not aware of any order to evacuate. Later that day a second, more powerful, mudslide hit the town. Ms Budayeva and her eldest son managed to escape. Her younger son was rescued, but sustained serious cerebral and spinal injuries. Her husband, Vladimir Budayev, who had stayed behind to help his parents-in-law, was killed when the block of flats in which he and his family lived collapsed.

The town was subsequently hit by a succession of mudslides over a period lasting until 25 July 2000. Eight people were officially reported dead, although

the applicants alleged that a further 19 people went missing. All the applicants claimed that their homes and possessions were destroyed and that their living conditions and health had deteriorated since the disaster.

According to the Government, the mudslides' exceptional force could not have been predicted or stopped. Following the first wave of mud on 18 July 2000, the authorities ordered an emergency evacuation of Tyrnauz. Police and local officials called at people's homes, and police vehicles equipped with loudspeakers drove round the town, urging residents to evacuate. Those residents who returned to their homes did so in breach of the evacuation order. All necessary measures were taken to rescue victims, to resettle residents and to bring in emergency supplies.

On 3 August 2000 the Prosecutor's Office of the Elbrus District decided not to launch a criminal investigation into the disaster or into Mr Budayev's death, which was considered accidental.

Following a decision by the Government of the Republic of Kabardino-Balkariya on 12 August 2000, all the applicants were granted free replacement housing and an emergency allowance in the form of a lump-sum (13,200 roubles, equivalent at that time to €530).

The applicants subsequently brought civil proceedings for compensation. Their claims were rejected on the grounds that the authorities had taken all reasonable measures to mitigate the risk of a mudslide.

The applicants disagreed with those conclusions. They accused the authorities of three major shortcomings in the functioning of the system for protection against natural hazards in Tyrnauz: firstly, they alleged that the authorities failed to maintain mud-protection engineering facilities, notably to repair a mud-retention dam which had been damaged in 1999; secondly, they complained about the lack of a public warning; and finally, they complained that there was no enquiry to assess the effectiveness of the authorities' conduct before and during the mudslide.

In support of those accusations, the applicants submitted newspaper articles; witness statements; and, official letters and documents which proved that no funds had been allocated in the district budget for the repair work required after the 1999 mudslide and that the authorities received a number of warnings about the imminent disaster from the Mountain Institute, a state agency responsible for

monitoring weather hazards in high-altitude areas. In its warnings, the Institute recommended that the damaged mud-protection dam be repaired and that observation posts be set up to facilitate the evacuation of the population in the event of a mudslide.

2. Decision of the Court

Relying on Articles 2 (right to life), 8 (right to respect for private and family life), 13 (right to an effective remedy) and Article 1 of Protocol No. 1 (protection of property), the applicants alleged that, as a result of the Russian authorities' failure to mitigate the consequences of the mudslides from 18 to 25 July 2000, the authorities put their lives at risk and were responsible for the death of Mr Budayev and the destruction of their homes. They also complained under Article 2 that the authorities failed to carry out a judicial enquiry into the disaster.

Article 2

The Court noted that in 1999 the authorities had received a number of warnings that should have made them aware of the increasing risks of a large-scale mudslide. In such circumstances, the authorities should have taken essential practical measures to ensure the safety of the local population such as warning the public and making prior arrangements for an emergency evacuation.

However, the applicants consistently maintained and the Government confirmed that residents had not received any warning until the mudslide had actually arrived in the town on 18 July 2000. Moreover, despite persistent requests by the Mountain Institute, temporary observation posts in the mountains had not been set up, such that the authorities had no means to estimate the time, force or duration of the mudslide. Finally, the Government provided no information concerning other solutions which had been envisaged to ensure the safety of the local population such as a regulatory framework, land-planning policies or specific safety measures. Their submissions exclusively referred to the mud-retention dam and collector, which, as already established, had not been adequately maintained.

The inadequate maintenance of the mud-defence infrastructure, and the failure to set up a warning system meant that the Russian authorities had failed in their duty to establish a legislative and administrative framework with which to provide effective deterrence against a threat to the right to life, in violation of Article 2.

The Court then moved on to consider the judicial response to the disaster. Within a week of the disaster the prosecutor's office had already decided to dispense with a criminal investigation into the circumstances of Vladimir Budayev's death. The inquest had been limited to the immediate causes of his death and had not examined questions of safety compliance or the authorities' responsibility. The applicants' claims for damages had been dismissed by the Russian courts for failing to demonstrate to what extent the State's negligence had caused damage exceeding what had been inevitable in a natural disaster.

The Court therefore concluded that the question of Russia's responsibility for the accident in Tyrnauz had never as such been investigated or examined by any judicial or administrative authority, in violation of Article 2.

Article 1 of Protocol No. 1

The parties agreed that it was unclear to what extent proper maintenance of the defence infrastructure, or proper warning systems, could have mitigated the exceptional force of those mudslides. The damage caused by the mudslides could not therefore be unequivocally attributed to State negligence.

Moreover, a State's obligation to protect private property could not be seen as synonymous with an obligation to compensate the full market value of a destroyed property.

On that basis, the Court concluded that the housing compensation and compensation for house belongings to which the applicants had been entitled had not been manifestly out of proportion to their lost homes. There had therefore been no violation of Article 1 of Protocol No. 1.

Other Articles

The Court considered that it was unnecessary to examine separately the complaint under Article 8, and that no separate issues arose under Article 13.

Article 41

The Court awarded in respect of non-pecuniary damage €30,000 to Khalimat Budayeva, €15,000 to Fatima Atmurzayeva and €10,000 to each of the other applicants.

No violation of Article 2 as the applicants, whose new born baby died in hospital, had voluntarily accepted compensation through a settlement and therefore waived their right to pursue civil proceedings

8. JUDGMENT IN THE CASE OF CALVELLI AND CIGLIO v. ITALY

(Application no. 32967/96)
17 January 2002

1. Principal facts

The applicants were both Italian nationals, whose baby was born in a private clinic in Cosenza, Italy, on 7 February 1987. Immediately following its birth, their baby was admitted to the intensive care unit, suffering serious respiratory and neurological post-asphyxia syndrome induced by the position in which it had become lodged during delivery. The baby died two days later.

On 10 February 1987 the applicants lodged a complaint and the Cosenza Public Prosecutor's Office started an investigation. The applicants were informed that charges would be brought against the doctor responsible for delivering their baby and the joint owner of the clinic, and, on 7 July 1989 they were joined as civil parties to the proceedings. On 17 December 1993 Cosenza Criminal Court found the doctor guilty in absentia of involuntary manslaughter, sentenced him to one year's imprisonment and ordered him to pay the civil parties' costs and compensation.

The Criminal Court found that the accused knew that the birth had to be regarded as high risk since the mother was a level A diabetic and had a past history of childbirths that had been equally difficult because of the size of the foetus. The risks inherent in deliveries in such circumstances meant that precautionary measures should have been taken and that the doctor in charge should have been present. The Criminal Court found, however, that the accused, with whom the applicant had consulted during the pregnancy, had taken no precautionary measures and had been absent during the birth, seeing patients elsewhere. When the complications occurred, it took the nursing staff six or seven minutes to locate him and the intervening delay significantly reduced the baby's chances of survival.

The Criminal Court nevertheless suspended the sentence and ordered that the conviction should not appear on the accused's criminal record. In addition, it

dismissed the civil parties' application for a provisional award of compensation. The accused appealed and, in a judgment of 3 July 1995, the Catanzaro Court of Appeal ruled that the prosecution of the offence was time-barred and the time limit for the relevant offence had expired on 9 August 1994.

Meanwhile, the applicants also brought civil proceedings against the accused. However, on 27 April 1995, while the criminal proceedings were still pending before Catanzaro Court of Appeal, they entered into an agreement with him and the clinic's insurers under which the insurers were to pay 95,000,000 Italian lire (ITL)[753] for the damage sustained by the applicants. Subsequently, as the parties failed to attend a hearing on 16 November 1995, the case was struck out.

2. Decision of the Court

The applicants complained, under Article 2, that, owing to procedural delays, a time-bar had arisen making it impossible to prosecute the doctor responsible for the delivery of their child. They also complained, under Article 6 § 1, that the length of the proceedings was unreasonable.

Article 2

The Court observed that, under Article 2, Italy was required to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of patients' lives. It was also required to provide an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, could be determined and those responsible made accountable. Article 2 was therefore considered applicable in the present case.

It was noted that the Italian system offered litigants remedies which, in theory, met the requirements of Article 2, as it afforded injured parties mandatory criminal proceedings and the possibility of bringing a civil action. The Government also affirmed, and the applicants did not deny, that disciplinary proceedings could be brought if the doctor was held liable in the civil courts. However, this provision could not be satisfied if such protection existed only in theory: above all, it had to operate effectively in practice within a time-span such that the courts could complete their examination of the merits of each individual case.

[753] Approximately equivalent to €49,000 at the time.

The Court noted that the criminal proceedings instituted against the doctor concerned had become time-barred because of procedural shortcomings that had led to delays, particularly during the police inquiry and judicial investigation. However, the applicants were also entitled to issue proceedings in the civil courts and had done so. It was true that no finding of liability had ever been made against the doctor by a civil court. However, the applicants had entered into a settlement agreement and voluntarily waived their right to pursue those proceedings. This could have led to an order against the doctor for the payment of damages and possibly to the publication of the judgment in the press. A judgment in the civil court could also have led to disciplinary action against the doctor. It was therefore considered that the applicants had denied themselves access to the best means, which, in the special circumstances of the instant case, would have satisfied the positive obligations arising under Article 2: elucidating the extent of the doctor's responsibility for the death of their child.

The Court reiterated that where a relative of a deceased person accepted compensation in settlement of a civil claim based on medical negligence, he or she could in principle no longer claim to be a victim. It was therefore not necessary for the Court to examine whether the fact that a time-bar prevented the doctor being prosecuted for the alleged offence was compatible with Article 2. The Court therefore held that there had been no violation of Article 2.

Article 6 § 1

The Court noted that the proceedings concerned were undeniably complex. Further, although after the applicants were initially joined as civil parties to the proceedings on 7 July 1989, the proceedings at first instance had been affected by regrettable delays, there had not been any further significant periods of inactivity attributable to the authorities (apart from the adjournment of the first hearing, which was caused by a lawyers' strike). It therefore considered that a period of six years, three months and ten days for proceedings before four levels of jurisdiction could not be regarded as unreasonable. Consequently, there had been no violation of Article 6 § 1

Procedural and substantive violation of Article 2 where the State failed to provide adequate care and treatment to a severely mentally disabled and HIV-positive applicant and then failed to adequately investigate the circumstances of his death.

9. GRAND CHAMBER JUDGMENT IN THE CASE OF CENTRE FOR LEGAL RESOURCES ON BEHALF OF VALENTIN CÂMPEANU v. ROMANIA

(Application no. 47848/08)
17 July 2014

1. Principal Facts

The application was brought on behalf of Valentin Câmpeanu, who was born in 1985 and died in 2004. Mr Câmpeanu was abandoned at birth and placed in an orphanage. In 1990 at the age of five, he was diagnosed as HIV-positive and as suffering from a severe mental disability. In March 1992 he was transferred to the Craiova Centre for Disabled Children and at a later stage to the Craiova no. 7 Placement Centre.

In September 2003, the County Child Protection panel ordered that Mr Câmpeanu should no longer be cared for by the State, on the grounds that he had reached the age of 18 and was not enrolled in any form of education. In early February 2004, after successive refusals by a series of institutions to admit Mr Câmpeanu, he was eventually admitted to a medical and social care centre (CMSC), which found him to be in an advanced state of psychiatric and physical degradation, without any antiretroviral medication and suffering from malnutrition.

On 9 February, following a sudden outburst where Mr Câmpeanu allegedly acted aggressively he was taken to Poiana Mare Neuropsychiatric Hospital (PMH) for examination and treatment. However, he was returned to the medical and social care centre on the same day. On 13 February, Mr Câmpeanu was again taken to PMH for treatment. Having spent one week there where he was placed in different Psychiatric divisions.

On 20 February he was seen by a team of monitors from the Centre for Legal Resources (CLR) who reported that Mr Câmpeanu was left alone in an isolated and unheated room, with a bed but no bedding, scantily dressed in only a pyjama top

and without the assistance he needed in order to eat or use the bathroom facilities, as the hospital staff allegedly refused to help him over fear of contracting HIV. The CLR representatives stated that they had asked for him to be immediately transferred to the Infectious Diseases Hospital in Craiova, where he could receive appropriate treatment. However, the hospital's manager had decided against that request, believing that the patient was not an "emergency case, but a social case", and that in any event he would not be able to withstand the trip. On the same day, 20 February 2004, Mr Câmpeanu died.

Unaware of Mr Câmpeanu's death, the CLR drafted several urgent letters and sent these to a number of local and central officials highlighting his extremely critical condition and the fact that he had been transferred to an institution that was unable to provide him with appropriate care. The CLR further criticised the inadequate treatment he was receiving and asked for emergency measures to be taken to address the situation. It further stated that Mr Câmpeanu's admission to the CMSC and subsequent transfer to the PMH had been in breach of his human rights, and urged that an appropriate investigation of the matter be launched.

On 22 February 2004 the CLR issued a press release highlighting the conditions and the treatment received by patients at the PMH, making particular reference to the case of Mr Câmpeanu and calling for urgent action.

2. Decision of the Court

In response to the many complaints lodged by the CLR and following the subsequent criminal investigation into Mr Câmpeanu's death, the CLR alleged that Mr Câmpeanu's rights under Article 2, 3, 5, 8, 13 and 14 had been violated.

Admissibility

The Court dismissed the objection by the Romanian Government that the CLR did not have standing to lodge the complaint on behalf of Valentin Câmpeanu, as it could neither claim to be a victim of the alleged violations of the Convention itself, nor was it Mr Câmpeanu's valid representative. The Court emphasised that the Convention guarantees rights, which are practical and effective, not theoretical and illusory, and that bearing in mind the serious nature of the allegations, it had to be open to the CLR to act as Mr Câmpeanu's representative.

Article 2

The Court stated that the Romanian authorities' decision to place Mr Câmpeanu in the medical and social care centre and subsequently transfer him to PMH had been determined mainly by which establishment was willing to accommodate him rather than where he would be able to receive appropriate medical care and support. Noting that the medical and social centre was not adequately equipped to handle mental health patients, they transferred him to PMH, despite the fact that that hospital had previously refused to admit him, and was subsequently placed in a department with no psychiatric staff.

The transfers from one establishment to another had taken place without any proper diagnosis and aftercare and in complete disregard of Mr Câmpeanu's actual state of health and most basic medical needs. Of particular note was the authorities' failure to ensure he received antiretroviral medication.

The Court paid particular attention to Mr Câmpeanu's vulnerable state, and the fact that for his entire life Mr Câmpeanu had been in the hands of the authorities, which were therefore under an obligation to account for his treatment. By deciding to place Mr Câmpeanu in that hospital, even though they were aware of the appalling conditions in the psychiatric hospital, the authorities had unreasonably put his life in danger. The failure to provide him with appropriate care and treatment was yet another decisive factor leading to his untimely death. The Court hence concluded that the Romanian authorities had breached Article 2 by failing to ensure the necessary protection of Mr Câmpeanu's life.

Furthermore, the Court found a violation of Article 2 as regards the procedural requirements under that Article, as the authorities had failed to clarify the circumstances of Mr Câmpeanu's death and identify those responsible for it.

Article 13 in conjunction with Article 2

A breach was found of Article 13 in conjunction with Article 2, as the State had failed to provide an appropriate mechanism for redress to people with mental disabilities claiming to be victims under Article 2.

In view of its findings under Articles 2 and 13, the Court held that it was not necessary to separately examine the complaints under Article 3, taken alone and in conjunction with Article 13, Articles 5, 8 and 14.

Article 46

The Court held that the respondent State should take necessary general measures to ensure that mentally disabled persons in comparable situations were afforded independent representation, enabling them to have Convention complaints relating to their health and treatment examined before a court or other independent body.

Article 41

The CLR had not submitted any claims in respect of pecuniary or non-pecuniary damages, so no such award was made. The Court held that Romania was to pay €10,000 to the CLR and €25,000 to the organisation Interights, which acted as advisor to counsel for the CLR, for costs and expenses.

The authorities' continued failure to implement measures to protect communities affected by toxic emissions from a steelwork plant violated Article 8

10. JUDGMENT IN THE CASE OF CORDELLA AND OTHERS v. ITALY

(Application nos. 54414/13 and 54264/15)
24 January 2019

1. Principal facts

The applicants were 180 people who lived in the municipality of Taranto, Italy or in neighbouring areas. They complained of the environmental and health impacts of toxic emissions from the Ilva steelworks plant in Taranto (the Ilva Plant), which was the largest industrial steelworks complex in Europe.

On 30 November 1990, the Italian Council of Ministers classified Taranto and other municipalities as "high environmental risk" areas. A number of scientific reports found that tumours and instances of cardiovascular disease in the local population were higher than the regional and national average. The reports also established a causal link between this finding and the toxic emissions produced by the Ilva Plant.

From the end of 2012, the Government adopted a number of legislative decrees ("the Salva-Ilva" decrees) concerning the activities of the Ilva Plant. In 2017 the President of the Council of Ministers executed a decree which postponed the implementation of the measures envisioned by the environmental plans to 2023. The region of Apulia and the municipality of Taranto challenged the legality and constitutionality of the decree before the Administrative Court of Apulia, in light of the environmental and public health consequences of such an extension. They demanded an annulment of the decree and a stay to its execution. These administrative proceedings were still pending at the time the case came before the European Court.

The Ilva Plant's management was also the subject of several sets of criminal proceedings for serious ecological harm, the poisoning of food substances, failure to prevent accidents in the workplace, the degradation of public property, and the emission of pollutants and air pollution. Some of these proceedings were successful and resulted in convictions in 2002, 2005, and 2007. The Court of

Cassation condemned the management of the Ilva Plant in particular, for air pollution, the dumping of hazardous materials, and the emission of particles; the last of which had continued despite numerous agreements made with the local authorities in 2003 and 2004.

In a judgment of 31 March 2011, the Court of Justice of the European Union held that Italy had failed to comply with its obligations of integrated pollution prevention and control under Directive 2008/1 EC of the European Parliament and Council. Pursuant to an infringement procedure opened against Italy on 16 October 2014, the European Commission issued a reasoned opinion which noted that Italy had failed to fulfil its obligations to guarantee the Ilva Plant's compliance with the Industrial Emissions Directive and requested the Italian authorities to remedy the serious problems caused by the pollution from the Ilva Plant.

The company running the Ilva Plant became insolvent in 2015 and the administrator was granted administrative and criminal immunity for implementation of the environmental measures.

2. Decision of the Court

The applicants complained that the authorities' failure to adopt legal and administrative measures to protect their health and the environment, as well as their failure to provide them with information on the pollution and its risk to their health, violated their rights under Articles 2 and 8 of the Convention. The Court considered the complaints under Article 8.

Admissibility

The Government argued that the complaints were inadmissible because, amongst other reasons, they were of a general character and did not refer to particular situations or provide evidence of sufficiently serious harm suffered by individuals. The Court reiterated that the Convention did not provide any general protection against environmental harms. However, the Court took account of the numerous scientific reports provided to it, and found them to contain irrefutable evidence that the pollution produced by the Ilva Plant had harmful consequences on the health and wellbeing of the applicants who lived in the areas identified by the Government as being at "high environmental risk". The claims of those who lived in such areas were therefore admissible. However, the 19 applicants who had not lived in these areas could not claim victim status.

Article 8

The Court noted that since the 1970's a number of scientific reports, many of which were issued by the State and regional bodies, had showed the impact of toxic emissions from the Ilva Plant on the environment and the health of the local population. The findings of these reports were not disputed by either party. This included a report from 2012 which confirmed that there was a causal link between exposure to inhalable carcinogenic substances produced by the Ilva Plant and the development of lung tumours and cardiovascular disease in local populations. The report made public health recommendations for the areas concerned, which the State failed to implement. It was not for the Court to determine the precise measures which the authorities should have taken to reduce the level of pollution in the region. However, it was for the State to demonstrate that it had approached the question diligently, taking into account all the interests concerned, including the impact of the emissions on the applicants.

Serious ecological harm can engage Article 8 where it significantly reduces the applicant's capacity to enjoy their home, or their private or family life. Whether this minimum level has been met will depend on the cause, intensity, and duration of the harm, as well as its consequences on the physical and psychological health and quality of life of the applicant. While it is often impossible to quantify the effects of industrial pollution and distinguish them from the influence of other factors in any given case, the Court is bound to base its decision above all, albeit not exclusively, on the conclusions of the courts and other competent domestic authorities.

In the case of a dangerous activity, in particular, the State had a positive obligation to adopt protective measures having regard to the level of risk associated with the activity. To fulfil both this positive obligation and its negative obligation not to arbitrarily interfere with the applicants' right to their home, private and family life, the State was required to balance the interests of the Ilva Plant on the one hand, and those of the applicants' on the other. The authorities' attempts to decontaminate the region had not so far produced the desired results. Its failure to implement the measures from 2012, envisioned by the "AIA" (an administrative environmental decree), was the basis of an infringement procedure brought before the institutions of the European Union. Moreover, the implementation of environmental plans approved in 2014 was postponed to August 2023. Meanwhile, the Government had intervened by way of the Salva-Ilva decrees to guarantee the continuation of the Ilva Plant's steelwork production, despite judicial findings that these activities involved serious risks to the environment and the health of the local population.

In addition, the company running the Ilva Plant had become insolvent and the individuals responsible for the Ilva Plant's compliance with environmental measures, namely the administrator and the future buyer, were granted administrative and criminal immunity. Ultimately, the authorities' management of the environmental hazard caused by Ilva's activities had come to an impasse. The Court noted that the prolongation of this situation would further endanger the health of the local population, who were still deprived of information regarding the progress of the rehabilitation of the region.

In conclusion, the authorities had failed to strike the appropriate balance between the applicants' interest not to suffer serious damage to the environment which could affect their well-being and their private life, and the interest of society as a whole. Accordingly, the Court held there was a violation of Article 8.

Article 13

Given it had proven impossible for the applicants to obtain a measure which guaranteed the decontamination of the area, they did not have access to an effective remedy. Therefore, there was a violation of Article 13.

Article 46

The applicants of application no. 54264/15 sought the operation of the pilot-judgment procedure. While the Court could assist the State and suggest potential measures of a general nature, it was for the Committee of Ministers to decide on the specific measures necessary to fulfil the State's obligations under Article 46. Given the complexity of the techniques required to rehabilitate the area, which fell within the competence of national authorities, it was not appropriate to apply the pilot-judgment procedure. However, the work to clean up the Ilva Plant and the affected region was essential and urgent. As such, any relevant plans adopted by the national authorities were to be implemented as quickly as possible.

Article 41

The Court held that its finding of a violation constituted sufficient just satisfaction in respect of non-pecuniary damage and that Italy should pay €5,000 for costs and expenses in respect of each application.

The systematic failure to establish the applicant's adult son's cause of death violated the procedural limb of Article 2

11. JUDGMENT IN THE CASE OF EUGENIA LAŽAR v. ROMANIA

(Application no. 32146/05)
16 February 2010

1. Principal facts

The applicant was born in 1951 and lived in Dobra, Romania. On the night of 10 July 2000, the applicant's 22-year-old son, Adrian, showed signs of suffocation and she drove him to Deva County Hospital. He was admitted to the emergency ward at 2:30 a.m. and transferred to the ear, nose and throat ("ENT") department, where Dr C administered cortisone to treat him. At about 2:45 a.m. Dr C sent for Dr M who decided to perform a tracheotomy to clear Adrian's respiratory tract. At around 3:15a.m. both doctors operated on him, but he suffered respiratory arrest and could not be resuscitated. He died at around 5 a.m.

In July 2000, the applicant lodged a criminal complaint against both doctors alleging that they had failed to act quickly enough to save Adrian's life. At the request of the police, an autopsy report was issued on 6 November 2000 which stated that he died from asphyxiation following the tracheotomy, which had been performed correctly but too late as he had been wrongly transferred to the ENT department. However, another forensic institute concluded that the doctors could not be held liable for this coordination problem. Finally, on 15 October 2001, the Higher Forensic Medical Board of the Mina Minovici Institute in Bucharest ("the Supreme National Authority on Forensic Medicine") gave its opinion on the two reports and concluded that the doctors had acted in accordance with accepted practice and had not committed any medical errors.

The prosecutor's office discontinued criminal proceedings against the doctors in November 2001, relying on the decision of the Supreme National Authority on Forensic Medicine. The applicant made two appeals against the decision to discontinue criminal proceedings and the public prosecutor ordered the production of fresh forensic medical reports on both occasions. However, three institutes refused to produce such new reports, stating that the Forensic Medicine Institutes Act ("the Act") prevented them from carrying out fresh expert examination after the Supreme National Authority on Forensic Medicine had already given its

opinion and/or no new evidence had emerged. The criminal proceedings were therefore discontinued on both occasions.

On 15 October 2004, the court of first instance allowed the applicant's appeal against the decision to discontinue proceedings and ordered the prosecutor's office to institute criminal proceedings against Dr C for involuntary manslaughter. The court was critical of the way the investigations had been conducted and that the criminal proceedings had lasted for five years. It also found it inconceivable that the Supreme National Authority on Forensic Medicine had invoked the Act to avoid its obligation to produce a second medical report and stressed that a highly scientific and intellectual report was needed to establish the truth of the case. It noted that the report of 15 October 2001 had exonerated the doctors without any scientific basis. The case was referred back to the County Court for further investigation. On 8 February 2005, the County Court issued a final judgment acquitting Dr C of manslaughter. It stated that once the Supreme National Authority had issued its opinion, the Act prevented judicial authorities from soliciting another forensic medical report without fresh evidence. Without the ability to collect further evidence, it relied on the Supreme National Authority's opinion and concluded that Adrian's death had been caused by post-operative complications.

Finally, the applicant obtained a disciplinary decision against Dr C from a medical council. However, this decision was later quashed on the grounds that the applicant had lodged the complaint before the wrong council, despite the fact that she had informed and invited the correct council to participate in the disciplinary proceedings.

2. Decision of the Court

The applicant complained that the death of her son was a result of the hospital's negligence and that the criminal investigation into his death violated Article 6 of the Convention. The Court chose to examine the complaint under Article 2.

Article 2

The Court asserted that the procedural aspect of Article 2 imposes a positive obligation on the State to put in place an effective and independent judicial system to determine the cause of death of patients at the hands of medical professionals and, where appropriate, to hold them accountable. While coordination failures in

a public hospital were of great concern, the Court could not speculate on Adrian's cause of death. Instead, the Court examined both the adequacy of the criminal investigation to establish his cause of death and the adequacy of the judicial remedies available to the applicant to establish liability for her son's death.

The Court first examined whether the authorities' criminal investigation was prompt and effective. A requirement of promptness was implicit in cases of medical negligence examined under Article 2. The investigation in this case did not meet this requirement as it had taken four years. Nevertheless, the Court went on to examine whether the investigation was effective and found that it was undermined by two significant shortcomings: a lack of cooperation from the forensic medical experts and the lack of reasons given in the expert opinions which were provided.

Despite the length of the investigation, a lack of cooperation from the forensic medical experts meant that the authorities had been unable to provide a coherent and scientifically based answer as to whether Adrian's death had occurred accidentally during the tracheotomy, as a result of a delay in the procedure, or by asphyxiation. This question was fundamental to the investigation and would have determined whether the hospital staff were criminally liable for medical negligence. The Court noted that the authorities had sought the assistance of forensic medical institutes. However, these institutes refused to assist, insisting that the Act prevented them from carrying out fresh expert examination after the Supreme National Authority on Forensic Medicine had already given its opinion and/or no new evidence had emerged.

Further, the County Count's finding in its judgment of 8 February 2005, that evidence acquired probative value where it could no longer be replaced by fresh evidence or refuted by other evidence of the same scientific value was in direct contradiction with the implicit obligation under Article 2 to take steps to produce a complete record of the facts and an objective analysis of clinical findings. The existence of a legal provision authorising forensic medical institutes to ignore requests from the judicial authorities to cooperate for the purposes of an investigation was not compatible with the State's primary duty to protect the right to life. This duty involved implementing a legal and administrative framework to establish the cause of death of patients at the hands of medical professionals.

As for the lack of reasons given in the experts' opinion, the first report of 6 October 2000 had clearly noted that the hospital's emergency medical assistance

protocol was dysfunctional and caused a delay in performing the surgery. This conclusion was confirmed, at least in part, on review by the second report. However, the Supreme National Authority on Forensic Medicine, whose opinions were based solely on those of the lower-level institutes, rejected this conclusion without reasons. The Court considered that only a detailed and scientifically substantiated report that directly engaged with the contradictions in the opinions of the lower-level institutes could assist the judicial authorities and inspire public confidence in the administration of justice. The obligation to provide reasons in its scientific opinion was especially important in the present case given that the Act prevented lower-level institutes from producing fresh reports or supplementing previous ones once the Supreme National Authority had issued its opinion. In addition, litigants were unable to rely on scientific opinions issued by establishments other than the State forensic medical institutes listed in the Act. The internal regime for forensic medical reports should have required experts to give reasons for their opinions and to cooperate with judicial bodies to instil credibility and effectiveness into the system.

The Court then considered whether the national judicial system provided the applicant with appropriate remedies to establish the doctor's liability. In relation to the disciplinary proceedings brought by the applicant, it found that the authorities had required excessive formalism given that she had duly informed both disciplinary institutions of her appeal. Further, an appeal to the joint disciplinary committees would have been made in vain since the Act authorised the forensic medical institutes to refuse to produce a report once the Supreme National Authority had already issued its opinion. Finally, a civil claim for compensation would have failed without a finding of medical negligence from the authorities' investigation. While there had been changes to the national public health regulations to attach responsibility to doctors for risks taken in medical practice, they did not apply retroactively to the applicant.

In conclusion, for the above reasons, in particular, the inability of the authorities to conclusively establish Adrian's cause of death and the corresponding liability of his doctors, the Court held that there had been a violation of the procedural aspect of Article 2.

Article 41

The Court awarded the applicant €20,000 in respect of non-pecuniary damage and €296 for costs and expenses.

The applicant's prolonged and unjustified detention at an immigration detention centre in unsanitary and overcrowded conditions, and unnecessary housing in Covid-19 quarantine was found to violate Articles 5 § 1 and 3

12. JUDGMENT IN THE CASE OF FEILAZOO v. MALTA

(Application no. 6865/19)
11 March 2021

1. Principal facts

The applicant, Joseph Feilazoo, was a Nigerian national who was born in 1975 and lived in Safi (Malta). In February 2010 he pleaded guilty to drug related charges and was sentenced to 12 years' imprisonment and a fine and required to pay costs. Unable to pay neither the fine nor costs, the applicant received an additional sentence of 22.5 months imprisonment.

A few days prior to his release, the applicant informed immigration officers that he would like to return to Spain as he had a residence permit. However, the Spanish authorities purportedly refused to accept the applicant. Instead, on his release date (10 April 2018) the applicant was told that he would be further detained pending removal to Nigeria and that he had been deemed a prohibited immigrant under Maltese law. It was alleged that the applicant became aggressive at this meeting, resisting arrest and causing two correctional officers to suffer bodily harm. The applicant was taken to hospital; as noted in expert reports, he suffered a number of injuries including blunt trauma to his head and face.

An investigation was opened into the assault of the correctional officers. On 11 April 2018 the applicant was questioned in relation to the 10 April 2018 incident without a lawyer present and correspondingly refused to sign the resulting statement. In February 2019 the applicant was found guilty of various assault charges and sentenced to two years' imprisonment and a fine and ordered to pay costs. His immediate deportation (after payment of the fine) was ordered, however the fine was converted into six months' imprisonment due to his inability to pay. Whilst in prison, the applicant alleged that he was moved between different security regimes to hinder his access to legal aid and the progress of his application to the European Court of Human Rights. In addition, he alleged that he was denied access to his medical documents and that his correspondence with the Court was interfered with. Although released on 14 September 2019, the

applicant was immediately put in immigration detention at Safi Barracks where he remained until 13 November 2020. At one point, the applicant was housed with people in Covid-19 quarantine, seemingly for no reason. The Nigerian authorities refused to issue a travel document, thus preventing the applicant's deportation.

2. Decision of the Court

The applicant alleged violations of Article 3 (prohibition of inhuman and degrading treatment) 5 (right to liberty and security) and 34 (right of individual petition) of the Convention.

Article 3

The applicant alleged multiple violations of Article 3: i) that excessive force had been used against him; ii) that no relevant investigation ensued; iii) that the Government failed to protect him; and iv) that the conditions of detention in the immigration detention centre amounted to inhuman and degrading treatment. The first three complaints were deemed inadmissible on the ground that the applicant had failed to exhaust domestic remedies.

In relation to the fourth complaint, the applicant submitted that the Safi barracks, a former military barracks, was not built for the purpose of housing asylum seekers like him and that the authorities had failed to preserve his mental and physical wellbeing. He submitted, inter alia, that he had slept on a mattress in overcrowded conditions (an allegation supported by photographic evidence), of major pest issues and unsanitary handling of food and that he had had been held in a container without access to natural light for nearly 75 days, for 40 of which he was held in de facto isolation without access to exercise. After complaining about these conditions, he was then moved to different living quarters, which he discovered were being used for new arrivals kept in Covid-19 quarantine.

The Court recalled that to fall within the scope of Article 3 ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case. States must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the individual is not subject to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. When assessing conditions, their cumulative effects, as well as the specific allegations, must be taken into account, as must the length of the period.

The Court examined the contrary submissions of the applicant and Government, noting that cases concerning allegations of inadequate conditions of detention do not lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation) because in such instances the respondent Government alone normally has access to information capable of corroborating or refuting these allegations.

The Court highlighted that while the applicant had submitted photographic evidence, the Government relied on general, unsubstantiated statements. Lack of sufficient data regarding the number of detainees being held prevented the Court from drawing conclusions about overcrowding. However, it remained concerned about various other unrebutted elements of the applicant's allegations, in particular, his accommodation in a container for nearly 75 days. The Court found that, whilst of itself accommodation in a container may not amount to inhuman a degrading treatment, the conditions in this case were of particular concern given the heat, the limited light and ventilation, limited (if any) access to exercise, limited access to the use of his phone and the fact that he was held in isolation for 40 days.

Moreover, there was no indication of any need to subsequently place the applicant in Covid-19 quarantine quarters, especially in light of the fact that he had already been in isolation for the previous seven weeks. The unjustified measure of placing him for several weeks with those who posed a risk to his health could not be regarded as complying with basic sanitary requirements. Taking account of the cumulative effect of all the above factors, the Court concluded that there had been a violation of Article 3.

Article 5 § 1

The applicant complained that some periods of his detention were unlawful as there was no prospect of his deportation, which had not been pursued diligently as required by Article 5 § 1(f). The Court reiterated that Article 5 enshrined the protection of the individual against arbitrary interference by the State with his or her right to liberty, and disagreed with the Government's submission that the detention period beginning on 15 September 2019 was for the purpose of the applicant's deportation. The only apparent step taken to progress the deportation was to write once to the Nigerian authorities following the initial request for the issuing of a travel document. The Government were not found to have acted diligently during the 14 months in issue and therefore the reasons for

the applicant's detention had not remained valid throughout the whole period. Accordingly, there had been a violation of Article 5 § 1.

Article 5 § 2/Article 6

The applicant also complained under Article 5 § 2 that he had not had a lawyer during his interrogation of 11 April 2018, however the Court considered that this complaint fell under Article 6 §§ 1 and 3 (c). The complaint was deemed inadmissible on the basis that the applicant had not exhausted domestic remedies.

Article 34

The applicant claimed that that the Government had hindered his right of petition before the Court by interfering with his correspondence with the Court and by impeding his access to effective domestic legal aid representation.

In relation to the former, the Court recalled that Article 34 requires that applicants or potential applicants be able to communicate freely with the Convention organs, without being subjected to any form of pressure from the authorities to withdraw or revise a complaint. The confidentiality of correspondence with Convention organs must be respected as it may concern allegations against prison authorities or officials. In the present case, the Court considered that that the manner in which the applicant's correspondence from the Court was passed on to him through his local legal aid lawyer via emails to the personnel of the detention facility meant that his correspondence had not been dealt with confidentially. The authorities also failed to ensure that the applicant was provided with the possibility of obtaining documents to substantiate his application. The applicant's right of individual petition had been interfered with without justification.

In relation to the latter, the Court also found that the applicant's domestic legal aid representation had been inadequate in the light of, in particular, the lack of regular lawyer-client contact (despite the Court's requests), the lawyer's lack of diligence in dealing with his case and the inaction on the part of the Government (to which the actions of the domestic legal aid lawyer were imputed) to remedy the situation.

As such, there had been a violation of the applicant's right of individual petition under Article 34.

Article 41

The Court ordered that the Government pay the applicant €25,000 in respect of non-pecuniary damage.

Complaints challenging pre-trial detention and the suspension of court proceedings during the Covid-19 pandemic declared inadmissible conditions of detention of suspect during the Covid-19 pandemic did not amount to a violation of Articles 2 or 3

13. DECISION AND JUDGMENT IN THE CASE OF FENECH v. MALTA

(Application no. 19090/20)
Decision 23 March 2021
Judgment 1 March 2022

1. Principal Facts

The applicant, Mr Yorgen Fenech, was a Maltese national, born in 1981. He was a businessman and the former head of the Tumas Group (a large real estate and development company in Malta). On 20 November 2019, he was arrested on his yacht on suspicion of involvement in the murder of the Maltese journalist, Daphne Caruana Galizia, in October 2017. On the same day, he was released on bail.

On 30 November, the applicant appeared before the Court of Magistrates and was accused of promoting, organising or financing an organisation with a view to committing a criminal offence, and complicity in wilful homicide. The applicant pleaded not guilty, was remanded in custody and detained in the Corradino Correctional Facility (CCF). At CCF, the applicant was placed in solitary confinement from 30 November 2019 to 3 January 2020, as he tested positive for cocaine. It was the CCF's policy to not allow inmates testing positive for drug use to mix with others until they tested negative.

On 18 December 2019 the applicant made a bail application. The Court of Magistrates rejected the application due to the risks posed by the applicant's release, such as the manipulation of evidence and interference with the course of justice. The applicant made a second bail application on 30 January 2020, which was also rejected as there was still deemed to be a real risk of manipulation of the course of justice. That risk had assumed more significant proportions and was sufficient to justify a denial of bail. Committal proceedings were adjourned to the 27 March 2020.

On 13 March 2020, in light of the Covid-19 crisis in Malta, the Superintendent of Public Health declared, by virtue of a Legal Notice that a public health emergency existed in Malta. On the same day, the Maltese Department of Information published Legal Notice 65 of 2020, namely 'Closure of the Courts of Justice Order, 2020' and Legal Notice. 61 of 2020, namely 'Epidemics and Infectious Disease (Suspension of Legal and Judicial Times) Order, 2020' ("Emergency Measures"). Cumulatively, the Emergency Measures closed the courts of justice and the court registry with effect from 16 March 2020 and suspended the running of any legal or judicial times as well as any time period under any substantive or procedural law. Regulation 3 of the Legal Notice 61 of 2020 provided for the power of the court to open its registry, the hearing of any case, anything consequential and incidental in urgent cases or cases where it deemed that the public interest in having the case heard should prevail, subject to safeguards controlling dangerous epidemics or infectious disease. These measures were to remain in force until seven days following the lifting of the said orders of the Superintendent.

On 1 April 2020, the applicant's lawyers filed a *habeas corpus* application before the Criminal Court. The applicant complained, *inter alia*, that the decision to suspend all criminal proceedings until an unspecified date amounted to a *sine die* suspension, which meant that the applicant could not be tried within a reasonable time while he was detained. The Criminal Court rejected the applicant's petition, noting that the applicant had not made a request to have his proceedings continued, a safeguard provided for under Regulation 3 of the Legal Notice 61 of 2020. The applicant's requests were hence premature and unfounded, considering he had access to such remedies and his bail requests had been heard and rejected, rendering his detention necessary in the circumstances. Moreover, although Malta had not submitted a derogation under Article 15 of the ECHR, the right to liberty was not an absolute right in a state of emergency such as the Covid-19 pandemic, which was an international emergency.

On 6 April 2020, the applicant filed a bail application before the Criminal Court, which was subsequently rejected. It was noted that the applicant had been charged with a serious crime and arraigned only four months earlier, during which time proceedings were being heard in an expeditious manner. There had been no change in circumstances and the dangers did not disappear due to the closure of the courts. It was still open to the applicant to make a request under Regulation 3 of the Legal Notice 61 of 2020 to resume his proceedings.

On 8 April 2020, the applicant filed an application pursuant to Regulation 3 of the Legal Notice 61 of 2020 for the resumption of the compilation of evidence proceedings by the Court of Magistrates and the hearing of evidence. The Criminal Court rejected this request, noting the procedural requirement that mandated the presence of the parties, which would place a substantial amount of people in a confined space for a considerable amount of time. In addition, there was a lack of digital infrastructure to allow the proceedings to be heard electronically. Thus, on balance between the public interest, the urgency of the case and the risk of contagion, the public health of those involved in the proceedings should prevail.

On 16 April 2020, the applicant made another application for bail, raising the issue of the *sine die* suspension of court proceedings and the risk of contracting Covid-19 whilst incarcerated, all of which violated his right to life and freedom from ill-treatment. He also noted his medical condition, the previous loss of a kidney, as a significant health risk if he contracted Covid-19. This request was rejected on 21 April. The Criminal Court considered numerous factors such as, *inter alia*, the seriousness of the crime and the risk of witness influence. Moreover, it held that there were specific indications of a genuine requirement of public interest which outweighed the rule of respect for individual liberty. In particular, the homicide concerned the death of an investigative journalist via car bombing during a very specific time within a historical and socio-political context. The murder had an impact at an international level and drew the attention of the media and reactions from organisations such as the Council of Europe. Furthermore, the court closure in response to the Covid-19 pandemic was justified for health reasons and only a temporary measure. However, the Criminal Court called for arrangements to operate at least part of the applicant's case virtually. Ultimately, bail could not be granted because any changes to the applicant's circumstances were minimal.

By a decision of 19 May 2020, the Criminal Court authorised the continuation of the applicant's criminal proceedings. At the time of the European Court's judgment, the proceedings were ongoing and the applicant was still in detention in the CCF. In the applicant's view, his conditions of detention at the CCF were unsanitary and unhealthy, especially in relation to overcrowding, lack of clean and warm clothing, and with very limited physical exercise. He also considered that the State had failed to take adequate measures to protect him from contracting Covid-19 whilst in prison even though his medical condition – the previous loss of a kidney – placed him at increased risk and that his chances of overcoming Covid-19 were diminished.

The applicant instituted constitutional proceedings before the Civil Court on 1 May 2020, seeking a declaration of breaches of Articles 5 § 1 (c) and 5 § 3 and 5 § 4 of the Convention and asked the court to release him. Although the first instance Civil Court held that the applicant's rights under Article 5 had been breached, this was overturned on appeal by the Constitutional Court on 23 November 2020.

2. Decision of the Court

The applicant complained under Articles 2 and 3 of the Convention about his conditions of detention and the State's failure to protect his health whilst in prison, in particular owing to his medical condition. He also complained under Articles 5 §§ 1, 3 and 4 of the Convention about the lawfulness of his detention and the relevant remedies. Lastly, relying on Article 6 § 1, the applicant complained that he was deprived of his right to access to court and to trial within a reasonable time.

Admissibility

Articles 2 and 3

The Court decided to give notice of the applicant's complaints under Articles 2 and 3 to the respondent Government.

Articles 5 § 1 and 5 § 3

Relying on Article 5 § 1 (c) and Article 5 § 3, the applicant complained that the Emergency Measures put in place and their execution had not been clearly defined and foreseeable.

In relation to Article 5 § 1 (c), the Court assessed whether the purpose of the applicant's continued detention was to bring him before a "competent legal authority" in accordance with Article 5 § 1 (c). The Court considered that the mere fact the Emergency Measures enacted in light of the Covid-19 pandemic suspended the proceedings sine die, unless authorised, did not mean that the prosecution had no intention of bringing the applicant before the competent legal authority. In addition, the suspension was in place for less than three months. Accordingly, the Court rejected the application under Article 5 § 1 (c) as inadmissible.

In relation to Article 5 § 3, the Court noted that the applicant lodged four bail requests, which were decided speedily by the domestic courts despite the closure

of the courts. Each bail decision gave details of the grounds for the decisions in view of the developing situation and stated whether and why the original grounds remained valid despite the short passage of time between bail applications. Accordingly, the Court rejected the application under Article 5 § 3 as inadmissible.

Article 5 § 4

Relying on Article 5 § 4, the applicant complained that the Criminal Court, in its decree of 2 April 2020, refused to consider the lawfulness of his detention.

The Court noted that by virtue of Article 5 § 4, a detainee is entitled to ask a "court" having jurisdiction to decide "speedily" whether or not his or her deprivation of liberty has become "unlawful" in the light of new factors which have emerged subsequent to the initial decision to order his or her remand in custody. The Court held that the decision of the Criminal Court dealt sufficiently with the applicant's complaint based on the arguments in his bail application and went further, covering issues of a substantive and procedural nature not raised by the applicant.

Accordingly, the Court held that the complaint was manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

Article 6

Relying on Article 6 § 1, the applicant complained that he had been deprived of his right to access to court and trial within a reasonable timeframe.

The Court noted that, at that point, the proceedings had lasted sixteen months, which was not an unreasonable timeframe considering the complexities of the applicant's case. The applicant had not provided evidence that the authorities were not actively pursuing his case or other bases to reproach the authorities for their treatment of the applicant's case. Furthermore, the Court held that the suspension of hearings caused by Malta's emergency measures responding to the COVID-19 pandemic did not impair the applicant's right of access to a court.

Accordingly, the Court held that the complaint was manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

Judgment on the Merits

Article 3

In relation to the applicant's placement in solitary confinement from 30 November 2019 to 3 January 2020, the Court reiterated that removal of contact with other prisoners for security, disciplinary or protective reasons did not in itself amount to inhuman treatment or degrading punishment. Regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned. In the present case, the Court noted that the isolation had been imposed for security and protective reasons, the period was for no longer than thirty-five days, the applicant did not suffer any psychological or physical effects as a result, and the restrictions had not amounted to complete sensory deprivation. While the Court considered that the applicant should have been notified of the decision in writing, it found no violation of Article 3 on this point.

In relation to the conditions of the dormitory to which the applicant was moved following his release from solitary confinement, the Court reiterated that it could not determine the specific number of square metres to be allocated to a detainee in order to comply with Article 3. The Court reflected instead on factors such as the duration of detention, opportunity for outdoor exercise, and both physical and mental health of the detainee. The Court considered the European Committee for the Prevention of Torture's (CPT) methodology in determining the minimal physical space to be allocated to a detainee, most notably the CPT's inclusion of space for outdoor exercise. In the present case, the applicant could move around normally and had access to a small yard throughout the day, and a larger yard for one hour per day. The applicant's other complaints – including lack of clean and warm clothing, inadequate ventilation, overcrowding – were considered to be unfounded as though the thin clothing was provided to him because of specific medical recommendations, in exchange he was given several blankets and did not seem to suffer any health concerns related to the clothing. The applicant was also always able to request more blankets and had access to a washing machine for his clothing. The applicant's complaint as to inadequate ventilation was unfounded as he admitted that the cell was equipped with a window of reasonable size. Finally, the Court found no evidence that the CCF was generally overcrowded, and the applicant always had access to a yard adjacent to his dormitory.

In relation to the other restrictions, namely access to the gym, seeing family, attending church and other activities, the Court noted that the limitations complained of occurred within the very specific context of a public health emergency, and were put in place on society at large. These restrictions could not be considered to have caused the applicant hardship of an intensity exceeding the inevitable level of suffering inherent in detention during a pandemic. Accordingly, the Court found the applicant's conditions of detention were not in breach of Article 3.

Article 2 taken with Article 3

While the Court did not exclude the applicability of Article 2 in Covid-19 related cases, it was not applicable in the present case. The applicant had not been infected with Covid-19 and was eligible for vaccination from April 2021. Even assuming his eventual infection, the applicant had not provided any studies or materials capable of giving a clear answer as to whether his condition would be of a life-threatening nature which would attract the applicability of Article 2.

The Court reiterated that Article 3 imposes a positive obligation on States to preserve the health and well-being of a prisoner. Overall, the Court held that the authorities had implemented adequate and proportionate measures to prevent and limit the spread of the virus. Among other measures, the prison had effectively been put into lockdown and general measures such as disinfection, mask wearing, temperature checks and Covid-19 testing for officials and inmates, and quarantine areas for inmates suspected of having Covid-19 had been put in place. In relation to the applicant's complaint that he should have been protected more than other detainees, the Court accepted that while provision should be made to separate the most vulnerable prisoners, the applicant had not shown that he fell within this category.

Accordingly, the Court held that there had been no violation of Article 3.

A systemic failure to protect the health of detainees and provide them with adequate medical care in prison violated Article 3 and required the adoption of general and individual measures under Article 46

14. JUDGMENT IN THE CASE OF GHAVTADZE v. GEORGIA

(Application no. 23204/07)
3 March 2009

1. Principal facts

The applicant was born in 1982 and was imprisoned in Tbilisi Prison No. 5. He was arrested on 19 October 2006 and sentenced on appeal to eight years and six months in prison. He affirmed that although he had been an intravenous drug user, he was in good health prior to his arrest. In support of this, he produced the results of a blood test from 10 October 2006 showing an absence of antibodies for hepatitis B and C.

He was hospitalised three times over the course of 2007. He was admitted to the prison hospital for the first time on 22 January 2007 suffering from chest pain, nausea, vomiting, jaundice, and a fever. The hepatologist diagnosed him with acute hepatitis C and concluded that he had been suffering from a fever for three months and that the jaundice had appeared about a week before. Despite undergoing intensive treatment, his condition remained serious and on 8 February he was diagnosed with cholestasis syndrome for which the doctor prescribed further treatment. Nevertheless, he was discharged and sent back to prison on 10 February without the doctor's authorisation.

In prison, he complained to the Rehabilitation Centre for Victims of Torture ("Empathy") about the unbearable conditions of his detention, and that he was suffering from jaundice, general weakness, dizziness, difficulties eating, insomnia, elevated temperature, chest pain, and pimples on various parts of his body. He was hospitalised for the second time on 20 February at the request of the prison doctor.

He was provided with treatment for scabies and hepatitis C. In the meantime, an infectious diseases specialist concluded that an MRI was necessary to determine the cause of his fever, which had persisted for months, but the prison administration refused. Although a spinal X-ray was taken, it did not show any sign

of disease. However, a spinal X-ray would only show spondylitis at an advanced stage. He was discharged from the hospital on 31 March. It was unclear whether this was authorised by the hospital doctors.

He was hospitalised for the third time on 23 April for pleurisy, extreme weakness, respiratory failure, and a high temperature. The doctor diagnosed him with subacute hepatitis C and tuberculosis pleurisy for which he received intensive treatment. In the opinion of an independent hepatology specialist, the progression of hepatitis C in difficult conditions gave rise to an immunodeficiency in the applicant. It was also found that the applicant had contracted scabies and tuberculosis in prison. The specialist prescribed a long-term treatment in a polyclinic to ensure the use of compatible treatments for hepatitis and tuberculosis. It appears this was not done. His treatment beyond August 2007 was unknown to the Court at the time of this judgment.

2. Decision of the Court

Relying on Article 3 of the Convention, the applicant complained that he had contracted various diseases in prison and that his health had deteriorated due to the detention conditions and a lack of adequate medical care.

Article 3

The Court found that a lack of appropriate medical care and the detention of a sick person under inadequate conditions could, in principle, constitute a violation of Article 3. States were under an obligation to organise their penal systems in a way which respected human dignity, regardless of any practical or financial difficulties.

There was no dispute between the parties that the applicant required medical treatment for his diseases. However, the Government argued that he had not contracted any illness whilst in prison and the applicant's blood test of 10 October 2006 could not prove that he contracted hepatitis C in prison given he was arrested 9 days later. The parties also agreed that for three months before his diagnosis in January 2007, the applicant suffered from persistent fevers and was not in good health. However, there was no record of any efforts to determine the cause of his fevers and no evidence that he received any medical treatment.

Further, the Government could not explain the absence of an attempt to determine the hepatitis C genotype necessary to prescribe an adequate antiviral

treatment and ascertain the applicant's chances of recovery. The authorities never took account of the specialist's recommendation to put the applicant in a polyclinic. Instead, they chose to treat his tuberculosis and pause the treatment aimed at eliminating the hepatitis C virus. The medical care for hepatitis C was therefore found to be manifestly inadequate. This inadequacy, as well as the unjustified interruptions of hospitalisation, had allowed the disease to advance to a chronic stage.

The Court considered that the applicant was likely to have contracted tuberculosis whilst in prison given the negative results of a March 2007 thorax X-ray, the lack of hygiene in Prison No. 5, and the fact that prisoners with tuberculosis were not separated from healthy prisoners. While he was provided with treatment to eliminate the infection, there was no evidence that there was any effort to prevent a relapse. Although the scabies treatment was adequate, it was held that the prison must have been in insalubrious condition for him to contract this contagious disease in the first place.

There was no justification for discharging the applicant from hospital twice. These interruptions did not appear to have the hospital doctors' approval and his return to the prison's insalubrious conditions while in poor health left him even more vulnerable. Even if the Court had accepted the Government's argument that the applicant's illnesses were caused by an immunodeficiency, this only provided another reason for the prison authorities to act in concert with the doctors.

Finally, in the Court's view, it was not compatible with Article 3 for a detainee to be hospitalised only once his symptoms were at their peak and to be discharged before recovery to a prison which could not provide adequate care. Therefore, there was a violation of Article 3.

Article 46

The number of cases pending against Georgia before the Court concerning the inadequacy of medical care for detainees suffering from contagious diseases revealed a systemic problem. Necessary legislative and administrative measures needed to be adopted as rapidly as possible to prevent further transmission of contagious diseases within the Georgian prison system, as well as the introduction of a screening system on admission to guarantee their prompt and effective treatment. As for the applicant's case, the State was ordered to place him in an establishment capable of providing him with adequate medical treatment for hepatitis C alongside tuberculosis.

Article 41

The Court awarded the applicant €17 for pecuniary damage, €9,000 for non-pecuniary damage, and €1,639 for costs and expenses.

The lack of medical care, entrapment and insufficient reasoning for detention of the applicant, who was HIV positive and suffered from several chronic diseases and mental illnesses, violated Articles 3, 5 and 6

15. JUDGMENT IN THE CASE OF KHUDOBIN v. RUSSIA

(Application no. 59696/00)
26 October 2006

1. Principal facts

The applicant was a Russian national who was born in 1979 and lived in Moscow.

On 29 October 1998 he was called by an undercover police informant, who asked him to buy her some drugs. The applicant agreed and bought 0.05 grams of heroin, which he paid for with the money she gave him. On his return to the meeting point where he was to hand it to her, he was apprehended by police officers.

The next day he was charged with drug trafficking and detained on remand. In ordering his detention, the prosecutor referred to the circumstances of the applicant's apprehension, the gravity of the charges against him and the risk of absconding. His detention was further prolonged on several occasions. No reasons were given for those decisions.

When the applicant was arrested, he was suffering from several chronic diseases, including epilepsy, pancreatitis, viral hepatitis B and C, as well as various mental illnesses. He was also HIV-positive. During his detention he contracted several serious diseases including measles, bronchitis and acute pneumonia. He also had several epileptic fits. On many occasions the defence informed the court, the administration of the detention centre and other State authorities about his serious health problems and requested a thorough medical examination without success.

On 27 July 1999 the domestic court decided that a new examination of the applicant's mental health was needed. It adjourned the case and ordered the applicant should remain in prison in the interim, without giving any reasons. The applicant's appeal against that decision was never heard.

The first hearing on the merits took place on 11 November 1999 before the District Court. The applicant was not present. The applicant's lawyer asked for an adjournment because several witnesses, including the person who sold heroin to the applicant, as well as the policemen involved in the operation, failed to appear. The court refused his request and found the applicant guilty of selling heroin, but released him due to the findings of a psychiatric report which stated that he had committed the crime in a state of insanity.

During the trial the applicant's defence argued that, contrary to Russian law, the applicant had been incited to commit an offence by the police informant. In his appeal, he claimed that the police had fabricated the crime and that the confession had been extracted by force. Moscow City Court dismissed the appeal on 11 January 2000.

2. Decision of the Court

The applicant alleged, in particular, that he did not receive adequate medical treatment in the remand prison, that the conditions of his detention were inhuman and degrading, that his pre-trial detention exceeded a reasonable time, that his applications for release had either been examined with significant delays or not examined, and, finally, that his conviction had been based entirely on evidence obtained as a result of police provocation. He relied on Article 3, Article 5 §§ 3 and 4 and Article 6 § 1.

Article 3

The Court noted that the parties presented differing accounts of the medical assistance received by the applicant in the detention facility and recalled that the relevant standard of proof for its assessment of evidence was "beyond reasonable doubt". Where the events in issue lie wholly, or in a large part, within the exclusive knowledge of the authorities, as in the case of persons in custody, strong presumptions of fact would arise in respect of injuries occurring during such detention. In such cases, the burden of proof shifts to the authorities to provide a satisfactory and convincing explanation. In the absence of such explanation, the Court can draw inferences which may be unfavourable for the respondent Government.

Accordingly, it went on to examine whether the burden of proof should be shifted in the present case. The applicant claimed he did not receive adequate

treatment for his diseases while in detention, but he did not present any medical documents which specified the nature of the treatment he actually received whilst in pre-trial detention, if any.

The Government did not deny that the applicant suffered from chronic diseases and mental deficiencies at the moment of his arrest. It was therefore noted that, in line with guidelines from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the authorities should have kept a record of his health status and any treatment he underwent while in detention. Concern was also raised as to the sharp deterioration in his health whilst in detention, raising doubts as to the adequacy of the medical treatment available. It was further noted that the applicant brought his grievances to the attention of authorities at a time when they could reasonably have been expected to take appropriate measures, and that his father also requested for an independent medical examination on at least two occasions. The Court found it alarming that these requests were refused, and examinations only possible on the initiative of investigatory authorities. An incident of 16 April 1999, when the applicant claimed his cell-mate had to administer an injection to stop a seizure, was also highlighted with particular concern. The applicant's account of events was accepted as he had produced a signed witness statement from his cell-mates, and the Government did not produce evidence to the contrary. Such assistance by non-qualified persons could not be regarded as adequate.

Overall, the factors above were in favour of the applicant's allegation that medical care in the detention facility was inadequate. In these circumstances it was up to the Government to refute them. However, it did not produce any document which explained what kind of medical treatment was administered to the applicant. Indeed, its related submissions were vague and poorly substantiated. The applicant's account was therefore accepted.

The Court accepted that the medical assistance available in prison hospitals may not always be at the same level as in the best medical institutions for the general public. Nevertheless, the State must ensure that the health and well-being of detainees are adequately secured by, among other things, providing them with the requisite medical assistance. It was noted that the applicant was suffering from several chronic diseases, was HIV-positive and suffered from a serious mental disorder, though nothing suggested that his status was in principle incompatible with detention. In these circumstances the absence of

qualified and timely medical assistance, added to the authorities' refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical suffering, the Court found it amounted to degrading treatment. The Court therefore held that there had been a violation of Article 3.

In view of this, it was considered unnecessary to examine the applicant's complaint about the general conditions of his detention separately.

Article 5 § 3

The Court noted its power to review domestic courts' findings in this context was limited: only if the reasoning was arbitrary or lacked any factual ground could it intervene and find that the detention was unjustified.

It noted the reasons given for the initial detention order on 30 October 1998. However, it observed that the domestic courts gave no reasons while extending the applicant's detention or dismissing several applications for release lodged by the defence. It recalled that the gravity of the charge could not by itself serve to justify long periods of detention pending trial nor could it be used to anticipate a custodial sentence. It further observed that the authorities did not take into account important factors, such as the applicant's young age, his health problems, his absence of a criminal record, the fact that he had a permanent place of residence and stable family relations. It appeared that this lack of reasoning was not an accidental or short-term omission, but rather a customary way of dealing with applications for release.

The Court concluded that the applicant's detention, lasting one year and 23 days, was not justified by "relevant and sufficient" reasons and therefore held that there had been a violation of Article 5 § 3.

Article 5 § 4

The Court recalled there were two aspects to the "speediness" requirement, both assessed in light of the circumstances of each case: first, the opportunity for legal review must be provided soon after the person is taken into detention and, if necessary, at reasonable intervals thereafter. Second, the review proceedings must be conducted with due diligence.

The Court found that the reviews of the applications for release were unduly delayed. In view of those findings the Court held that there had been a violation of Article 5 § 4.

Article 6 § 1

The Court noted that the applicant did not have a criminal record and that the only allegations of his involvement in drug dealing came from the police informant. Furthermore, he made no financial gain from the deal. It therefore appeared to the Court that the police operation did not target the applicant personally as a well-known drug dealer, but rather any person who would agree to procure heroin for the informant.

In the absence of a comprehensive system of checks accompanying the police operation, the role of the subsequent control by the trial court became crucial. However, the Court noted that the policemen involved in the "test buy" were never questioned by the court, although the defence sought to have them heard, nor was the person convicted of selling the drug to the applicant. Finally, the Court was particularly struck by the fact that the applicant himself was not heard by the court on the subject of incitement as he was also absent from the hearing of 11 November 1999.

In sum, the Court found that, although the domestic court had reason to suspect that there was an entrapment, it did not analyse relevant factual and legal elements which would have helped it to distinguish the entrapment from a legitimate form of investigative activity. It followed that the proceedings, which led to the conviction of the applicant, were not "fair" and the Court held there had been a violation of Article 6 § 1.

Article 41

The Court awarded the applicant €12,000 in respect of non-pecuniary damage and approximately €3,130 for costs and expenses.

The applicant did not have standing before the Court as he could not prove that he was directly affected by the alleged failures of the French government to effectively respond to the Covid-19 pandemic and hence he was not a "victim" under Article 34

16. DECISION IN THE CASE OF LE MAILLOUX V. FRANCE

(Application no. 18108/20)
5 November 2020

1. Principal Facts

The applicant, Mr. Renaud Le Mailloux, was a French national born in 1974.

In response to the Covid-19 pandemic in 2020, the French authorities introduced various measures to prevent and reduce the effects of the threat to public health. Several decrees were enacted as well as a law on 23 March 2020. On 24 March 2020, a state of emergency was declared for two months. On 11 May 2020, the state of emergency was extended until 10 July 2020.

Considering the measures adopted by the authorities insufficient, the Aix and Region Medical Union (SMAER) and two private individuals lodged an urgent application for the protection of a fundamental freedom with the Conseil d'État. They sought an injunction on the State to take all measures to provide FFP2 and FFP3 masks to healthcare professionals, surgical masks for patients and the general population, and mass screening facilities for all. They also wanted the State to authorise doctors and hospitals to prescribe and administer a hydroxychloroquin and azithromycin drug combination to high-risk patients, and medical laboratories to conduct screening tests.

The applicant intervened in the proceedings in support of the application, claiming he was at high-risk owing to a serious health condition. On 28 March 2020, the Conseil d'État dismissed the application by SMAER and others.

2. Decision of the Court

The applicant complained under Articles 2, 3, 8 and 10 of the Convention of the State's failure to fulfil its positive obligations to protect the lives and physical integrity of persons under its jurisdiction. In particular, he complained of restricted access to diagnostic tests and specific treatments, the insufficiency of measures

taken to prevent the spread of the virus, as well an interference in the private lives of individuals who died of the virus alone.

Admissibility

As a preliminary point, the Court noted that although the right to health is not explicitly guaranteed in the Convention, States have a positive obligation to take measures to protect the lives of persons under their jurisdiction. While it interpreted the applicant's complaint in terms of the right to health, the Court held that it did not need to decide whether France had breached these positive obligations, as the application was inadmissible.

The Court reiterated that in order to rely on Article 34 of the Convention, an applicant must be the "victim" of a violation of the Convention. To this effect, the person concerned must be able to demonstrate that he was "directly affected" by the contested measure.

Further, the Court emphasised that the Convention does not authorise complaints *in abstracto* of violations of the Convention. *Actio popularis* complaints are not recognised: meaning that applicants cannot complain about a provision of domestic law, a domestic practice or public acts simply because they appear to contravene the European Convention. Rather, for an applicant to claim victim status, they must produce reasonable and convincing evidence of the likelihood of a violation occurring to them personally. Suspicions or conjectures are insufficient in this regard.

In the present case, the Court held that the applicant was complaining *in abstracto* of the insufficiency of the measures taken by the French authorities to combat the spread of Covid-19. The Court considered the application to amount to an *actio popularis* for two reasons.

First, the Court noted that the applicant had only raised these complaints in his capacity as a third party intervener in support of the urgent application before the Conseil d'État, rather than having brought proceedings himself. This was not sufficient to grant him victim status within the meaning of Article 34.

Second, the Court noted that the applicant provided no information about his health condition. He did not explain how the alleged failures of the French authorities were likely to affect his own health and private life. Further, he did

not produce any reasonable and convincing evidence that the measures taken by the French authorities were capable of leading to any of the violations he alleged. Rather, the Court held that the application had the sole purpose of contesting the measures taken by the French authorities in a general manner.

As a final point, the Court added that if the applicant were directly affected by the measures – for example if he were denied assistance or treatment as a result of the failures complained of – he could contest the compatibility of such failures with the Convention in the domestic courts.

Accordingly, the Court rejected the application as inadmissible, as the applicant could not be considered a victim of the alleged violations under Article 34 of the Convention.

Whilst the relevant regulatory framework did not disclose any shortcomings with regards to the State's obligation to protect the right to life of the applicant's husband, the lack of effective remedies constituted a breach of the procedural aspect of Article 2

17. GRAND CHAMBER JUDGMENT IN THE CASE OF LOPES DE SOUSA FERNANDES v. PORTUGAL

(Application no. 56080/13)
19 December 2017

1. Principal facts

The applicant was a Portuguese national whose husband underwent surgery to remove nasal polyps in Vila Nova de Gaia Hospital (CHVNG) in November 1997. On his return home he had violent headaches, so went back to CHVNG, where he was diagnosed with psychological problems and prescribed tranquilisers. The following day, he was diagnosed with bacterial meningitis by a new medical team and transferred to the intensive care unit. He remained there until early December 1997, when he was moved to a general medical ward, diagnosed with two duodenal ulcers, and treated by Dr J.V.

The applicant's husband left hospital eight days later, but his pain continued. He went to the CHVNG emergency department a further three times and was hospitalised twice. Tests included findings of *Clostridium difficile* bacterium. In early February 1998, he was discharged by Dr J.V., who prescribed treatment and referred him to the outpatient department for follow-up. Later in February 1998, the applicant's husband was admitted to a different hospital, where he died on 8 March 1998. The death certificate stated the cause was septicaemia.

In August 1998, the applicant wrote a letter to the Ministry of Health, the Regional Health Authority and the Medical Association, stating she had not received an explanation of the sudden deterioration in her husband's health and his subsequent death. In September 2000, the Inspector General for Health ordered an investigation, resulting in a report issued in July 2006, which concluded there were no grounds for disciplinary liability for negligence against the professionals concerned. However, it stated that Dr J.V.'s referral for outpatient follow-up was insufficient, and the applicant's husband should have remained in hospital under close supervision instead. Therefore, the Inspector General ordered disciplinary

proceedings against Dr J.V., which were stayed pending criminal proceedings. Dr J.V. was charged with homicide by negligence, but acquitted in January 2009 by the District Court due to lack of evidence. The disciplinary proceedings were dropped, and the applicant's subsequent appeals rejected, culminating in a dismissal by the Supreme Administrative Court in February 2013.

2. Decision of the Court

The applicant complained her husband's death had been caused by the negligence and carelessness of medical staff, and that the authorities had not explained the cause of his sudden deterioration in health. She further complained about the length and outcome of the domestic proceedings. On 15 December 2015, a Chamber held that there had been a substantive and procedural violation of Article 2. At the Government's request under Article 43, the case was referred to the Grand Chamber.

Article 2 (substantive)

The Court noted that it was frequently called upon to rule on cases concerning allegations of negligence occurring in the context of medical treatment in hospitals. It considered that the present case provided an opportunity to reaffirm and clarify the scope of the substantive positive obligations of States in such cases. It set out two types of "*very exceptional circumstance*" in which the responsibility of the State may be engaged under Article 2 in respect of healthcare providers.

First, it may be engaged where an individual patient's life is knowingly put in danger by denial of access to life-saving emergency treatment. It does not extend to instances of deficient, incorrect or delayed treatment.

It was observed the applicant did not allege her husband's death was intentional, but that he died as a result of a hospital acquired infection and medical negligence. The medical treatment of the applicant's husband had been subjected to domestic scrutiny and no judicial or disciplinary bodies found any fault with it. Moreover, none of the medical expert evidence conclusively established medical negligence. The Court reiterated that, except in cases of manifest arbitrariness or error, it was not its function to question the findings of fact made by domestic authorities, particularly with regards to scientific expert assessments. It was further noted that the applicant did not complain her husband had been denied access to medical treatment, nor was there any evidence that suggested this. It

was reiterated that cases where there was either an alleged error in diagnosis, leading to the delayed administration of proper treatment, or an alleged delay in a particular medical intervention, could not in themselves be held equivalent to the denial of healthcare.

Second, the responsibility of the State may be engaged where a systemic or structural dysfunction in hospital services resulted in a patient being deprived of access to life-saving emergency treatment. The authorities must, or ought to, have known about that risk and failed to undertake the necessary measures to prevent that risk from materialising, thus putting patients' lives, including the patient concerned, in danger. The acts and omissions must have gone beyond mere error or medical negligence, having instead been systemic or structural. More specifically, there must have been a link between the dysfunction and the harm which the patient sustained, and that dysfunction must have resulted from the State's failure to provide a regulatory framework.

There was insufficient evidence to demonstrate that any dysfunction, as described above, affected the hospitals in the present case. Moreover, it had not been demonstrated that the alleged fault went beyond mere error or medical negligence, or that those involved in the treatment failed, in breach of their professional obligations, to provide emergency medical treatments to the applicant's husband, despite being fully aware that his life was at risk if that treatment was not given. Moreover, the Court considered that the alleged lack of coordination between departments at CHVNG did not, by itself, amount to a dysfunction in hospital services capable of engaging the State's responsibility. Having regard to the detailed rules and standards laid down in the domestic law and practice of the respondent State in the area under consideration, the Court found that the relevant regulatory framework did not disclose any shortcomings with regard to the State's obligation to protect the right to life of the applicant's husband.

Therefore, the Court held there was no violation of the substantive limb of Article 2.

Article 2 (procedural)

The Court emphasised that Portugal's primary procedural obligation was to have a system of law in place so that the cause of patients' deaths could be determined and those responsible could be held accountable. In cases of medical

negligence, Portuguese law provided for the possibility of criminal and civil proceedings, and applications to the Ministry of Health and Medical Association. The applicant made use of these remedies, but the following deficiencies were noted.

Proceedings before the Inspectorate General for Health (IGS) lacked promptness, having taken two years to open the investigation, and a further year to appoint an inspector to run it. The applicant gave evidence for the first time almost three years and six months after she had contacted the authorities. She was informed just over seven years and ten months after the IGS process began that the disciplinary proceedings against Dr J.V. would be stayed pending the criminal proceedings.

The criminal proceedings were ineffective in that they lasted for over six years and eight months, were not conducted promptly and only concerned the charges against Dr J.V. and had not dealt with the other instances of medical negligence alleged by the applicant.

The length of proceedings before the Medical Association, approximately four years and five months, was unreasonable given it had only examined medical records and specialist opinions and had not heard any evidence.

The Court stated the action for compensation before the administrative courts had been capable of providing the applicant with the most appropriate redress. However, the proceedings lasted for over nine years and eleven months without justification.

In conclusion, the domestic system failed to provide an adequate and timely response in accordance with Portugal's obligations under Article 2, therefore violating its procedural limb.

Article 41

The Court held that Portugal was to pay the applicant €23,000 in respect of non-pecuniary damages.

The applicant's continued detention, and the conditions under which we was transferred to hospital to receive treatment for leukaemia, violated his rights under Article 3

18. JUDGMENT IN THE CASE OF MOUISEL v. FRANCE

(Application no. 67263/01)
14 November 2002

1. Principal facts

The applicant, Jean Mouisel, was born in 1948 and lived in France. On 12 June 1996 he was sentenced to fifteen years' imprisonment for armed robbery, kidnapping and fraud. A medical certificate dated 8 January 1999 showed that he was suffering from chronic lymphatic leukemia. As his condition worsened, he underwent chemotherapy sessions at a hospital during daytime as an outpatient. The applicant was put in chains during the journeys to the hospital and claimed that during the chemotherapy sessions his feet were chained and one of his wrists attached to the bed. He decided to stop his medical treatment in June 2000, complaining of these conditions and of the guards' aggressive behaviour towards him.

In order to determine whether the applicant's state of health was compatible with his continued detention, a medical report was drawn up on 28 June 2000. It concluded that the applicant should be treated in a specialised clinic, and on 19 July 2000 he was transferred to Muret Prison as a matter of urgency so that he could be near Toulouse Hospital. He was released on parole on 22 March 2001 subject to an obligation to undergo medical treatment or care.

2. Decision of the Court

Relying on Article 3 of the Convention, the applicant complained that he had been kept in detention, despite being seriously ill, and of the conditions of the detention.

Article 3

The Court noted that the period to be taken into consideration in the case began on the date of the first medical report diagnosing the applicant's condition,

8 January 1999, and ended with his release on parole on 22 March 2001.

The Court reiterated that the Convention does not contain any provision relating specifically to the situation of persons deprived of their liberty, let alone where they are ill, but such issues could raise issues under Article 3. Although there is no general obligation to release prisoners suffering from ill health, Article 3 requires States to protect the physical integrity of persons who had been deprived of their liberty, notably by providing them with any necessary medical assistance. The Court also reiterated that the method of execution of the measure should not subject the person detained to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

The French authorities were permitted by law to intervene in cases where prisoners were seriously ill. Under the Law of 15 June 2000, prisoners could be released on parole when they needed to receive treatment. Furthermore, by virtue of the Law of 4 March 2002 on the Rights of the Sick, prisoners' sentences could be suspended if they were critically ill or suffering from a chronic condition that was incompatible with their continued detention. The Court thus noted that prisoners' health was now a factor to be taken into account in determining how a prison sentence was to be served, notably regarding its length. However, it accepted that, in the case before it, neither remedy had been available to the applicant during the period concerned, as he did not satisfy the conditions required to obtain release on parole and the law allowing sentences to be suspended had not by that stage been passed.

As to the consequences of continued detention and the conditions in which the applicant was held, the Court found that his condition had become increasingly incompatible with his continued detention as his illness progressed. For example, medical reports referred to the difficulty in providing treatment in prison and the applicant's psychological condition, which had been aggravated by the stress of being ill. Despite this, the prison authorities had failed to take any special measures, which could have included admitting the applicant to hospital or transferring him to any other institution where he could be monitored and kept under supervision, particularly during the night.

Furthermore, although it had not been proved that the applicant was held in chains when he received treatment, there was no doubt that he was handcuffed on journeys to and from hospital. It was reiterated that handcuffing does not normally give rise to issues under Article 3, where it has been imposed in connection with

a lawful detention and does not entail use of force exceeding what is reasonably considered necessary, taking into account any danger the applicant posed and the risk of him absconding. However, in view of the applicant's condition, the fact that he had been admitted to hospital, the nature of the treatment and the applicant's frailty, the Court considered that use of handcuffs was disproportionate to the security risk posed. It noted that there was nothing to suggest that there was any significant risk of his absconding or resorting to violence. Lastly, the Court noted the recommendations of the European Committee for the Prevention of Torture concerning the conditions in which prisoners were transferred to hospital to undergo medical examinations – conditions which continued to raise problems in terms of medical ethics and respect for human dignity. The applicant's descriptions of the conditions in which he was escorted to and from hospital did not seem very far removed from the situations causing the Committee concern in this area.

In the Court's view, the national authorities failed to have sufficient regard to the applicant's condition. His continued detention, especially from June 2000 onwards, undermined his dignity and constituted particularly acute hardship that caused suffering beyond that which was inevitable with a prison sentence or treatment for cancer. Consequently, the Court held that the applicant's continued detention amounted to inhuman and degrading treatment and that there was a violation of Article 3.

Article 41

The Court awarded the applicant €15,000 for non-pecuniary damage.

The failure to take appropriate measures to protect the lives of vulnerable children in care, and the failure to conduct an effective investigation into their deaths, violated Article 2

19. JUDGMENT IN THE CASE OF NENCHEVA AND OTHERS v. BULGARIA

(Application no. 48609/06)
18 June 2013

1. Principal facts

The applicants were the Association for European Integration and Human Rights and nine parents of seven of the fifteen children and young adults who died during the winter of 1996/97 in the Dzhurkovo home. The Dzhurkovo home housed around 80 children over the winter of 1996/97, all of whom had severe physical or mental disabilities. Some children had been placed there at the request of their parents and others under an administrative decision after their parents had given them up for adoption.

Between 1996-1997, Bulgaria suffered a severe economic, financial, and social crisis. Inflation rose over 1,000% and the budget allocated to the Dzhurkovo home, which was the responsibility of the mayor, fell significantly in value. As a result, the authorities could no longer provide the Dzhurkovo home with the funds to cover the cost of food and basic necessities. During this winter, the food at the Dzhurkovo home was highly inadequate, the heating only came on for one hour every morning and evening, it was difficult to maintain basic levels of hygiene and there were insufficient numbers of staff. The staff and inhabitants of the neighbouring village brought food on a voluntary basis, to ensure that the children were not left completely unfed.

On 20 September 1996, the manager of the Dzhurkovo home sent a letter, signed by the mayor of Laki, to the Ministry of Employment and Social Policy which indicated that she did not have the material means to meet the basic needs of the children living there and that the conditions posed a serious and imminent risk to their lives. The first child died at the Dzhurkovo home on 15 December 1996. In January 1997, the municipal social services decided to place eight more children from another care home in the Dzhurkovo home.

Over the course of January 1997, the manager of the Dzhurkovo home and the mayor of Laki appealed to a number of humanitarian organisations, private donors, and the Ministry of Employment and Social Policy for basic supplies as there was a risk that the children would not survive the winter. By 22 February 1997, seven children had died. The manager sent a telegram to the Ministry of Employment and Social Policy emphasising the severity of the situation and repeated her request for urgent action. On the same date, she contacted the social welfare department of the Ministry which sent her a one-off payment of €3,720. By this point, 15 children had died in the home.

In July 1999, the regional public prosecutor's office initiated criminal proceedings against a person or persons unknown for 10 of the 15 deaths. An investigation was also ordered to establish whether a causal link existed between the failure to comply with the obligation to protect the lives and health of the children by providing enough food, heat, and other basic necessities and their deaths. A forensic medical report, ordered pursuant to this investigation, stated that it was difficult to determine the causes of death without an autopsy. No autopsies had been completed to establish the cause of the deaths as domestic law only required this where a person died in hospital, or at their relative's request.

In April 2004, the manager, the medical officer and the head nurse at the Dzhurkovo home were charged with unintentional homicide for breach of statutory duty. In October 2004, the Ministry of Finance responded to a request by the investigator for relevant documents by indicating that they had been destroyed on expiry of the statutory period. In January 2005, the regional public prosecutor's office sent the court an indictment against the manager, the medical officer, and the head nurse for professional negligence which caused the deaths of 13 children. However, the court acquitted the defendants. The Court of Appeal and the Supreme Court of Cassation upheld this decision.

2. Decision of the Court

The applicants complained that the State had breached its positive obligation to protect the lives of the vulnerable individuals in its care and that it had failed to conduct an effective investigation to establish the cause of the deaths and to identify those responsible. They further complained of the conditions at the Dzhurkovo home and alleged that the State had operated in a discriminatory manner on account of the state of health and vulnerability of the children. The Court chose to deal with the complaints under Articles 2, 3 and 13. Finally, the

applicants alleged that the court's refusal to join them as civil parties to the criminal proceedings and the length of the criminal proceedings violated Article 6.

Admissibility

The nine applicants who were natural persons had victim status as the legitimate heirs to their children in the Dzhurkovo home. The Association for European Integration and Human Rights had asked the Court for authorisation to legally represent the individuals whose legitimate heirs were unknown. However, the Association had failed to demonstrate that its participation was in the interests of justice and provide the Court with a reason to depart from its established jurisprudence. Therefore, the Association could not be considered a victim of a violation of the Convention and the complaints brought by it were rejected as incompatible *ratione personae*.

Article 2

The Court stated that the first sentence of Article 2 imposes an obligation on the State to take the necessary measures to protect the lives of persons within its jurisdiction. The authorities did not dispute that they were responsible for the care of the vulnerable children and adults placed in the public home, over which they had exclusive supervision. The Court considered that several factors suggested that the authorities should have known that there existed a real risk to the lives of the children and that they had not taken reasonable measures, within the limits of their powers, to mitigate this risk.

In the context of a harsh winter and a severe economic crisis, information concerning the risk posed to the children by a lack of heating, nourishment and medication was available from 10 September 1996. From this date, with the support of the mayor of Laki, the manager of the Dzhurkovo home began to alert the authorities to these risks and requested the appropriate aid. In fact, the manager had repeatedly raised the seriousness of the situation with the authorities. Therefore, it appeared that the officials at the highest level in the Ministry of Employment and Social Policy and other public institutions were aware of the risks to the health and lives of the children as early as September 1996, three months before the first death.

The fact that the tragic events had not occurred in a sudden, one-off and unforeseen manner equivalent to that of a *force majeure* event was a crucial

element to the case. Rather, this case concerned a danger to the lives of vulnerable persons in the care of the State to which the authorities were fully aware, in a situation which could be described as a national crisis. It was clear that the authorities had not taken prompt, decisive and sufficient measures to prevent the deaths, despite having had precise knowledge as to the real and imminent risks posed to the lives of the persons concerned.

The Court considered that the facts of the case were exceptional and distinct from an ordinary case of negligence. As such, allowing the applicants to bring claims for civil proceedings was not sufficient to fulfil the State's obligation to conduct an effective investigation under Article 2 as bringing a civil claim depended solely on the initiative of the victims. Article 2 required the authorities to conduct a swift and diligent investigation of its own motion. The Court noted that the official investigation began two years after the events and the subsequent criminal proceedings lasted around eight years. The Government provided no explanation for this delay in the criminal proceedings, during which one of the people responsible for running the Dzhurkovo home had died and some of the records were destroyed pursuant to the expiry of the five year document retention period. The authorities had not, therefore, acted with the reasonable diligence required to establish the cause of the deaths and the responsibility of the officials. The appearance of a lack of diligence also cast doubt on whether the investigation was conducted in good faith and added to the applicants' suffering.

The Court did not accept the Government's argument that the destruction of archives meant it could not be ascertained whether any administrative or disciplinary procedures had taken place to ascertain whether the authorities were responsible for the deaths. This argument was found to be contrary to the requirement of diligence, which was inherent to the notion of an adequate response. Further, there was no other indication in any of the available evidence that any such procedures had been opened to examine the issues with the management of the home which led to the deaths. Given the exceptional circumstances of the case, the civil proceedings available to the applicants were not sufficient to fulfil the State's obligations under Article 2. The State had failed in its obligation to protect the lives of the vulnerable children placed in its care and its duty to implement adequate procedural mechanisms to establish the facts of the case, thereby failing to protect the public interest which the facts of this case had revealed. Therefore, the Court held that there had been a violation of both the substantive and procedural aspect of Article 2.

Article 13 in conjunction with Article 2

The Court noted that claims for compensation could have been lodged at the time of the events against the institutions responsible for the Dzhurkovo home, namely the Ministry of Employment and Social Policy and the municipality of Laki. Further, Bulgarian law did not prevent the applicants from lodging civil compensation claims in parallel to the criminal proceedings. Therefore, the complaint under Article 13 in conjunction with Article 2 was inadmissible as manifestly ill-founded.

Articles 3 and 13

The Court held that it was not necessary to examine these complaints as they had been presented after its six-month time-limit. Accordingly, this part of the application was inadmissible.

Article 6

The Court noted that the applicants did not appeal the court's decision not to join the civil actions to the criminal proceedings. Moreover, this decision did not affect the applicants' right to bring separate civil proceedings. In any case, this complaint had not been brought before the Court within six months of the court's decision and was therefore out of time. As for the complaint regarding the length of the criminal proceedings, the applicants had not been joined as civil parties to the proceedings and therefore Article 6 was not applicable. This part of the application was therefore inadmissible.

Article 41

The Court awarded two applicants €10,000 each in respect of non-pecuniary damage and €2,000 to the Association for European Integration and Human Rights for costs and expenses. It considered that the finding of a violation constituted sufficient just satisfaction for the remaining applicants.

The State failed to comply with its positive obligations to protect the right to life and the peaceful enjoyment of property from a methane explosion, and to provide sufficient compensation

20. GRAND CHAMBER JUDGMENT IN THE CASE OF ÖNERYILDIZ v. TURKEY

(Application no. 48939/99)
30 November 2004

1. Principal facts

The applicant, Maşallah Öneryıldız, was born in 1955. At the material time he was living with 12 close relatives in the slum quarter of Kazım Karabekir in Istanbul.

The Kazım Karabekir area was part of an expanse of rudimentary dwellings built without any authorisation on land surrounding a rubbish tip which had been used jointly by four district councils since the 1970s, under the authority and responsibility of Istanbul City Council. An expert report drawn up on 7 May 1991 at the request of District Court, to which the matter had been referred by District Council, drew the authorities' attention to, among other things, the fact that no measures had been taken at the tip in question to prevent an explosion of the methane generated by the decomposing refuse. The report gave rise to a series of disputes between the mayors concerned. However, before the proceedings instituted by either of them had been concluded, a methane explosion occurred at the tip on 28 April 1993 and the refuse erupting from the pile of waste engulfed more than ten houses situated below it, including the one belonging to the applicant, who lost nine close relatives.

After criminal and administrative investigations had been carried out into the case, the two mayors concerned were brought before the courts, for failing to order the destruction of the illegal huts surrounding the rubbish tip, and for failing to renovate the tip or order its closure, in spite of the conclusions of the expert report of 7 May 1991. On 4 April 1996 the mayors in question were both convicted of "negligence in the performance of their duties" and were both fined 160,000 Turkish liras (TRL) and sentenced to the minimum three-month term of imprisonment provided for in Article 230 of the Criminal Code. Their sentences were subsequently commuted to fines, the enforcement of which was suspended.

The applicant subsequently brought an action for damages in his own name and on behalf of his three surviving children in the Istanbul Administrative Court, holding the authorities liable for the death of his relatives and the destruction of his property. In a judgment of 30 November 1995 the authorities were ordered to pay the applicant and his children TRL 100,000,000 for non-pecuniary damage and TRL 10,000,000 for pecuniary damage in respect of the destruction of household goods (equivalent at the material time to approximately €2,077 and €208 respectively). At the time of the judgment by the European Court, those amounts had yet to be paid to the applicant.

2. Decision of the Court

In a Chamber judgment of 18 June 2002, the Court held that there had been violations of Article 2 of the Convention and of Article 1 of Protocol No. 1. At the request of the Turkish Government under Article 43, the case was referred to the Grand Chamber.

The applicant alleged that the facts complained of had given rise to violations of Articles 2 (right to life), 13 (right to an effective remedy), 6 § 1 (right to a fair hearing within a reasonable time) and 8 (right to respect for private and family life) of the Convention, and of Article 1 of Protocol No. 1 (protection of property).

Article 2

The Court first examined the responsibility borne by the State for the deaths. The expert report submitted on 7 May 1991 had specifically referred to the danger of an explosion due to methanogenesis, as the tip had had "no means of preventing an explosion of methane occurring as a result of the decomposition" of household waste. The Court considered that neither the reality nor the immediacy of the danger in question was in dispute, seeing that the risk of an explosion had clearly come into being long before it was highlighted in the report of 7 May 1991 and that, given the site's continued operation in the same conditions, that risk could only have increased over time.

Since the Turkish authorities had known or ought to have known that there was a real or immediate risk to persons living near the rubbish tip (at least by 27 May 1991, when they had been notified of the report of 7 May 1991), they had had an obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals, especially

as they themselves had set up the site and authorised its operation, which had given rise to the risk in question. However, Istanbul City Council had failed to take the necessary urgent measures.

As to the Government's argument that the applicant had acted illegally in settling by the rubbish tip, the Court observed that in spite of the statutory prohibitions in the field of town planning, the Turkish State's consistent policy on slum areas had encouraged the integration of such areas into the urban environment and had thus acknowledged their existence and the way of life of the citizens who had gradually caused them to build up since 1960.

In the present case, from 1988 until the accident of 28 April 1993, the applicant and his close relatives had lived entirely undisturbed in their house, in the social and family environment they had created. It also appeared that the authorities had levied council tax on the applicant and other inhabitants of the slums and had provided them with public services, for which they were charged. Accordingly, the Government could not maintain that they were absolved of responsibility on account of the victims' negligence or lack of foresight.

The Court further noted that the Government had not shown that any measures had been taken to provide the slum inhabitants with information about the risks they were running.

In conclusion, the Court noted that the regulatory framework applicable in the present case had proved defective in that the tip had been allowed to open and operate and there had been no coherent supervisory system. The Court accordingly held that there had been a violation of Article 2.

The Court then moved on to examine the responsibility borne by the State in regard to the nature of the investigation. The sole purpose of the criminal proceedings had been to establish whether the authorities could be held liable for "negligence in the performance of their duties" under Article 230 of the Criminal Code, which provision did not in any way relate to life-endangering acts or to the protection of the right to life within the meaning of Article 2. The judgment of 4 April 1996 had left in abeyance any question of the authorities' possible responsibility for the death of the applicant's close relatives.

Accordingly, it could not be said that the Turkish criminal-justice system had secured the full accountability of State officials or authorities for their role

in the tragedy, or the effective implementation of provisions of domestic law guaranteeing respect for the right to life, in particular the deterrent function of criminal law. The Court therefore held that there had also been a violation of Article 2 concerning the inadequate investigation into the deaths of the applicant's close relatives.

Article 1 of Protocol No. 1 to the Convention

The Court rejected the Government's argument that the Turkish authorities had refrained on humanitarian grounds from destroying the applicant's house. The positive obligation on the authorities under Article 1 of Protocol No. 1 had required them to take practical steps, such as the timely installation of a gas-extraction system, to avoid the destruction of the dwelling.

The Court further noted that the compensation which the Turkish courts awarded the applicant for pecuniary damage had still not been paid even though a final judgment had been delivered. There had therefore been a violation of Article 1 of Protocol No. 1.

Article 13

The Court first examined the applicant's complaint about the lack of an effective remedy in relation to Article 2, and noted that the administrative-law remedy used by the applicant appeared to have been sufficient for him to enforce the substance of his complaint regarding the death of his relatives and had been capable of affording him adequate redress for the violation found of Article 2. However, the Court regarded that remedy as ineffective in several respects and considered it decisive that the damages awarded to the applicant – solely in respect of the non-pecuniary damage resulting from the loss of his close relatives – had never in fact been paid to him. It accordingly held that there had been a violation of Article 13.

In relation to Article 1 of Protocol No. 1, the decision on compensation had been long in coming and the amount awarded in respect of the destruction of household goods had never been paid. The Court therefore held that there had also been a violation of Article 13 also in regard to that complaint.

Article 6 § 1 and Article 8

Having regard to the findings it had already reached, the Court did not consider it necessary to examine the allegations of a violation of Article 6 § 1 and Article 8.

Article 41

The Court decided to award the applicant $2,000 (corresponding to the reimbursement of funeral expenses), €45,250 for pecuniary and non- pecuniary damage and €16,000 for costs and expenses. The Court also awarded €33,750 to each of the applicant's adult sons for non-pecuniary damage.

Landmark judgment: States have positive obligations under Articles 2 and 3 to protect women from domestic violence by private actors. Discriminatory judicial passivity in relation to gender-based violence was contrary to Article 14.

21. JUDGMENT IN THE CASE OF OPUZ v. TURKEY

(Application no. 33401/02)
9 June 2009

1. Principal facts

The applicant, Nahide Opuz, was a Turkish national born in 1972. In 1990 Ms Opuz started living with H.O., the son of her mother's husband. Ms Opuz and H.O. got married in November 1995 and had three children in 1993, 1994 and 1996. They had serious arguments from the beginning of their relationship and are now divorced.

Between April 1995 and March 1998 there were four incidents of H.O.'s violent and threatening behaviour towards the applicant and her mother which came to the notice of the authorities. Those incidents involved several beatings, a fight during which H.O. pulled out a knife and H.O. running the two women down with his car. Following those assaults the women were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: the applicant as a result of one particularly violent beating; and, her mother following the assault with the car.

Criminal proceedings were brought against H.O. on three of those occasions for death threats, actual, aggravated and grievous bodily harm and attempted murder. As regards the knife incident, it was decided not to prosecute for lack of evidence. H.O. was twice remanded in custody and released pending trial.

However, as the applicant and her mother withdrew their complaints during each of those proceedings, the domestic courts discontinued the cases, their complaints being required under the Criminal Code to pursue any further. The proceedings concerning the car incident were nevertheless continued in respect of the applicant's mother, given the seriousness of her injuries, and H.O. was convicted and sentenced to three months' imprisonment, later commuted to a fine.

On 29 October 2001 the applicant was stabbed seven times by H.O. and taken to hospital. H.O. was charged with knife assault and given another fine of almost 840,000 Turkish lira (the equivalent of approximately €385) which he could pay in eight instalments. Following that incident, the applicant's mother requested that H.O. be detained on remand, maintaining that on previous occasions her and her daughter had had to withdraw their complaints against him due to his persistent pressure and death threats.

Finally, on 11 March 2002 the applicant's mother, having decided to move to Izmir with her daughter, was travelling in the removal van when H.O. forced the van to pull over, opened the passenger door and shot her. The applicant's mother died instantly.

In March 2008 H.O. was convicted of murder and illegal possession of a firearm and sentenced to life imprisonment – however he was released pending the appeal proceedings. In April 2008 the applicant filed another criminal complaint with the prosecution authorities in which she requested the authorities to take measures to protect her as, since his release, her ex-husband had started threatening her again. In May and November 2008 the applicant's representative informed the European Court of Human Rights that no such measures had been taken and the Court requested an explanation. The authorities then took specific measures to protect the applicant, notably by distributing her ex-husband's photograph and fingerprints to police stations with the order to arrest him if he was spotted near the applicant's place of residence.

In the meantime, in January 1998, the Family Protection Act entered into force in Turkey which provided for specific measures for protection against domestic violence.

2. Decision of the Court

The applicant alleged that the Turkish authorities failed to protect the right to life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected. She relied on Articles 2, 3, 6 and 13. She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14.

Article 2

The Court considered that, in the applicant's case, further violence, indeed a lethal attack, had not only been possible but even foreseeable, given the history of H.O.'s violent behaviour and criminal record in respect of his wife and her mother and his continuing threat to their health and safety.

According to common practice in the member States, the more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution continue in the public interest, even if victims withdrew their complaints. However, when repeatedly deciding to discontinue the criminal proceedings against H.O., the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a "family matter". The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the applicant's mother's statements to the prosecution authorities that she and her daughter had felt obliged to do so because of H.O.'s death threats and pressure.

Despite the withdrawal of the victims' complaints, the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant's physical integrity. The Court held that the legislative framework then in force fell short of the inherent requirements in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims.

The Court therefore concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O.. Nor could the investigation into the killing, to which there had been a confession, be described as effective, it having lasted so far more than six years. Moreover, the criminal law system had had no deterrent effect in the present case. Nor could the authorities rely on the victims' attitude for the failure to take adequate measures. The Turkish authorities had therefore failed to protect the right to life of the applicant's mother, in violation of Article 2.

Article 3

The Court considered that the response to H.O.'s conduct had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions, which had had no noticeable preventive or deterrent effect on H.O., had been ineffective and even disclosed a certain degree of tolerance towards his acts. Notably, after the car incident, H.O. had spent just 25 days in prison and only received a fine for the serious injuries he had inflicted on the applicant's mother. Even more striking, as punishment for stabbing the applicant seven times, he was merely imposed with a small fine, which could be paid in instalments.

In addition, Turkish law had not provided for specific administrative and policing measures to protect vulnerable persons against domestic violence before January 1998, when the Family Protection Act came into force. Even after that date, the domestic authorities had not effectively applied those measures and sanctions in order to protect the applicant.

Finally, the Court noted with grave concern that the violence suffered by the applicant had not in fact ended and that the authorities continued to display inaction. Despite the applicant's request in April 2008, nothing was done until after the Court requested the Government to provide information about the protection measures it had taken.

The Court therefore concluded that there had been a violation of Article 3 as a result of the authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by H.O.

Article 14

According to reports submitted by the applicant, drawn up by two leading non-governmental organisations, and uncontested by the Government, the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All those victims were women, the great majority of whom were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income. Indeed, the reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively.

The Court therefore considered that the applicant had been able to show that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.

Other Articles

Given the above findings, the Court did not find it necessary to examine the same facts in the context of Articles 6 and 13.

Article 41

The Court awarded the applicant €30,000 in respect of non-pecuniary pecuniary damage and €6,500 for costs and expenses.

The establishment of the principle of the positive obligation to protect life under Article 2, in a case involving a young man seriously injured by his former teacher

22. JUDGMENT IN THE CASE OF OSMAN v. THE UNITED KINGDOM

(Application no. 23452/94)
28 October 1998

1. Principal Facts

The first applicant, Mulkiye Osman, was the mother of the second applicant, Ahmet Osman, who was a former pupil of Paul Paget-Lewis at Homerton House School.

In 1986 the headmaster of Homerton House School, Mr Prince, noticed that one of his teaching staff, Paul Paget-Lewis, had developed an attachment to Ahmet Osman. In January 1987 Mrs Green, the mother of Leslie Green, a pupil at the same school, made a complaint to Mr Prince that Paget-Lewis had been following her son home after school and harassing him. After being interviewed by the deputy head teacher Mr Perkins, Paget-Lewis also submitted a written statement, which Mr Perkins found "disturbing" since it clearly showed that he was "overpoweringly jealous" of the friendship between Ahmet Osman and Leslie Green. Mr Perkins suggested him to seek psychiatric help.

Meanwhile, the school management conducted several other interviews with the relevant individuals. According to the diary of Mr Prince, between 3 March 1987 and 17 March 1987 he met with the police on four occasions to discuss the matter.

While attempting to arrange a transfer of Ahmet Osman to another school, it was discovered that the files relating to Ahmet and Leslie Green had been stolen from the school office. Paget-Lewis denied any involvement in the theft.

On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. Mr Prince informed the police and wrote about this to the Inner London Education Authority (ILEA), he also informed them that he was worried that the psychological imbalance of Paget-Lewis might pose a threat to the safety of Ahmet Osman. Paget-Lewis was seen by Dr Ferguson, an ILEA psychiatrist, on

19 May 1987. Dr Ferguson recommended that Paget-Lewis remain teaching at the school but that he should receive some form of counselling and psychotherapy.

In the following days, a brick was thrown through a window of the applicants' house. A police officer was sent to the house and completed a crime report. On two occasions in June 1987, the tyres of the car of Mr Ali Osman (the first applicant's husband and the second applicant's father) were deliberately burst. Both incidents were reported to the police.

After another examination of Paget-Lewis, Dr Ferguson concluded that he should be removed from Homerton House and was designated temporarily unfit to work. Paget-Lewis was temporarily suspended from teaching, however this was lifted and he began working as a supply teacher at two other local schools.

In August or September 1987, a number of attacks were made on the properties of the Osman family, including pouring of engine oil and paraffin on the house, smashing the windscreen of Mr Osman's car, jamming their front door lock with superglue, and smearing of dog excrement on their doorstep and car. All these incidents were reported to the police.

The police visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he told them that the loss of his job was so distressing that he felt that he was in danger of doing something criminally insane, however the Government denied that this had been said.

On 7 December 1987 a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger.

On 15 December 1987 Paget-Lewis was interviewed by officers of ILEA at his own request. An ILEA memorandum dated the same day recorded that Paget-Lewis felt in a totally self-destructive mood, blaming Mr Perkins for all his troubles.

On 17 December 1987, police officers arrived at Paget-Lewis' house with the intention of arresting him on suspicion of criminal damage, but he was absent.

In early January 1988 the police commenced a procedure with a view to prosecuting Paget-Lewis for driving without due care and attention. In addition, Paget-Lewis' name was put on the Police National Computer as being wanted in

relation to the collision incident and on suspicion of having committed offences of criminal damage.

On 7 March 1988 Paget-Lewis was seen near the applicants' home by a number of people. At about 11 p.m. Paget-Lewis shot and killed Mr Osman and seriously wounded Ahmet Osman. He then drove to the home of Mr Perkins where he shot and wounded him and killed his son. Early the next morning Paget-Lewis was arrested.

On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility. He was sentenced to be detained in a secure mental hospital without limit of time.

On 28 September 1989 the applicants commenced proceedings against, *inter alios*, the Commissioner of Police of the Metropolis alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988. On 19 August 1991 the Metropolitan Police Commissioner issued an application to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The Court of Appeal subsequently held that, according to the exclusionary rule of the 1989 ruling of the House of Lords in the case of *Hill v Chief Constable of West Yorkshire*, no action could lie against the police in negligence in the investigation and suppression of crime on the grounds that public policy required immunity from suit.

2. Decision of the Court

Relying on Articles 2, 6, 8 and 13, the applicants complained that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure.

Article 2

The applicant asserted that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which Paget-Lewis posed, the authorities had failed to comply with their positive obligation under Article 2.

The Court firstly stated that, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their duty to prevent and suppress offences, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Although it had been asserted that by the stage where the police were informed of all relevant connected matters including a graffiti incident, the theft of the school files and Paget-Lewis' change of name, the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in those incidents or to keep a closer watch on him, the Court was not persuaded that the police's failure to do so at this stage could be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. In the Court's view, while Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger.

As Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident, the Court considered that the police's appreciation of the situation and their decision to treat it as a matter internal to the school could not be considered unreasonable.

With regards to the acts of vandalism against the Osmans' home and property, and the assertion that the police did not keep records of the reported incidents, the Court stated that this failing could not be said to have prevented the police from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court also noted in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage.

With regard to the alleged fact that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions, the Court considered that those statements could not be reasonably considered

to imply that the Osman family were the target of his threats and to put the police on notice of such.

Consequently, the Court considered that the applicants had failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. The Court accordingly found no violation of Article 2.

Article 8

The Court recalled that it had not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under Article 2. That conclusion equally supported a finding that there had been no breach of any positive obligation implied by Article 8.

As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the Court reiterated that the police had firstly taken the view that there was no evidence to implicate Paget-Lewis, and later, in the light of new developments in the case, an attempt had been in fact made to arrest and question Paget-Lewis on suspicion of criminal damage. Therefore, the Court concluded that there had been no breach by the authorities of any positive obligation under Article 8.

Article 6 § 1

The applicants alleged that the dismissal by the Court of Appeal of their negligence action against the police on grounds of public policy amounted to a restriction on their right of access to a court in breach of Article 6 § 1.

In regards to the applicability of Article 6, which the Government had disputed arguing that there was no right in domestic law to sue the police for negligence, the Court disagreed and considered that the applicants had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, and that the harm caused was foreseeable.

The Court then noted that the reasons which led the House of Lords in the *Hill case* to lay down an exclusionary rule to protect the police from negligence actions were based on the view that the interests of the community as a whole were best served by a police service whose efficiency and effectiveness in the battle against crime were not jeopardised by the constant risk of exposure to tortious liability for policy and operational decisions.

Although the aim of such a rule might be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court emphasised the issue of proportionality. The application of the rule without further enquiry into the existence of competing public interest considerations only served to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounted to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

The Court concluded that the application of the exclusionary rule in the case constituted a disproportionate restriction on the applicants' right of access to a court and violated Article 6 § 1.

Article 13

The Court considered that no separate issue arose under Article 13 in view of its finding of a violation of Article 6 § 1.

Article 50 (now Article 41)

The Court awarded each of the applicants the sum of GBP 10,000[754] for damages, and the GBP 30,000 for costs and expenses.

[754] Approximate value £1 = €1.60.

The Turkish legal system did not afford the applicants sufficient and appropriate redress in relation to a new-born infected with HIV through blood transfusions, and the authorities were ordered to provide lifetime medical cover – violations of Articles 2, 6 and 13

23. JUDGMENT IN THE CASE OF OYAL v. TURKEY

(Application no. 4864/05)
23 March 2010

1. Principal facts

The first applicant was born on 6 May 1996. The second and third applicants were his mother and father, all living in Izmir.

The first applicant was infected with the HIV virus when, born prematurely, he had to have a number of blood transfusions for an inguinal and umbilical hernia. His parents learnt of the infection, and that it could develop into the more severe Acquired Immune Deficiency Syndrome (AIDS), when he was approximately four months old.

In May 1997, the applicants brought criminal proceedings for medical negligence against the doctors involved in the blood transfusions, the Director General of the Turkish Red Cross in Izmir (the "Kızılay" from where the transfused blood had been obtained) and the Minister of Health. These proceedings were terminated as no fault could be directly attributed.

In December 1997 the applicants brought civil proceedings against the Kızılay and the Ministry of Health; and, in October 1998 administrative proceedings against the latter. Both the civil and administrative courts ruled that the Kızılay was at fault for supplying HIV-infected blood and that the Ministry of Health was to be held responsible for the negligence of its staff in the performance of their duties. Furthermore, the Ankara Civil Court of First Instance established that the HIV infected blood given to the first applicant had not been detected because the medical staff had not done the requisite tests, considering that it would be too costly. That court found moreover that, prior to the first applicant's infection, there was no regulation requiring blood donors to give information about their sexual history which could help determine their eligibility to give blood. On account of these deficiencies, and failure to comply with the already existing regulations, the

civil and administrative courts awarded the applicants non-pecuniary damages plus statutory interest.

Following these orders for compensation, the "green card" issued by the Ministry of Health to provide those on borderline incomes with access to free health care and medicine, was withdrawn from the applicants. However, the compensation awarded covered only one year's medical treatment expenses and did not suffice to pay the costs of the first applicant's medication. Despite promises made by the authorities to pay the first applicant's medical expenses, both the Kızılay and the Ministry of Health rejected the applicants' claims for healthcare and medication amounting to €6,800 per month.

The third applicant was severely affected by the reactions of other children's parents to his son's condition and the school's refusal to admit him. Due to ill-health, the third applicant was unable to work at the time of judgment. This contributed to serious economic difficulties, meaning the family tried to pay medical expenses with the help of family friends. The first applicant, although ultimately admitted to a public school, had to have weekly psychotherapy, and had no close friends.

2. Decision of the Court

The applicants complained that the State authorities had failed in their positive obligation to protect the right to life of the first applicant as a result of his infection with the HIV virus by blood supplied by the Kızılay, and that no effective investigation had been conducted into their criminal complaints. They also complained, under Articles 6 and 13, of the excessive length of administrative proceedings and that the compensation eventually awarded did not cover the costs of the necessary medication.

Article 2

The Court reiterated that, even if the Convention does not as such guarantee a right to have criminal proceedings instituted against third parties, the effective judicial system required by Article 2 may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the sphere of

medical negligence, this obligation may be satisfied by a civil remedy, enabling any liability of the doctors concerned to be established and appropriate civil redress to be put in place, such as an order for damages or disciplinary measures. Therefore, the Court considered whether the Turkish legal system afforded the applicants sufficient and appropriate civil redress.

It noted the applicants had access to both the civil and administrative courts, which held the Kızılay and Ministry of Health liable for damages caused to the applicants. However, the Court found this redress insufficient in the circumstances: the compensation covered only one year's medical expenses for the first applicant and the family's green card was withdrawn. Thus the family were left in debt and poverty, unable to meet the €6,800 monthly cost of the first applicant's treatment.

Though the Court acknowledged the national courts' sensitive and positive approach in determining the case, it considered the most appropriate remedy in the circumstances would have been to have ordered the Kızılay and Ministry of Health to pay for the lifetime treatment and medication expenses of the first applicant, in addition to non-pecuniary damages.

In relation to the length of the administrative proceedings, it was recalled that the obligations in Article 2 would only be satisfied if the protection existed both in theory and in practice, which required prompt examination of the case without unnecessary delay. Given their excessive length, over nine years and four months, the Court held this requirement was not met and therefore there had been a violation of Article 2.

Articles 6 and 13

It was considered that the administrative proceedings had not been complex as the negligence and responsibility of the authorities was already established during the civil proceedings. Given the gravity of the situation and what was at stake for the applicants, the courts should have acted with "exceptional diligence" in deciding upon the case. The Court therefore held that the length of the administrative proceedings had been excessive, in violation of Article 6. In recalling that it had already found in previous case law that the Turkish legal system had not provided an effective remedy whereby the length of proceedings could be successfully challenged, the Court further found, that there had been a violation of Article 13.

Article 41

The Court held that the applicants were to be paid €300,000 in respect of pecuniary damages, €78,000 in respect of non-pecuniary damages and €3,000 for costs and expenses. In addition, the Government was to provide free and full medical cover to the first applicant for the rest of his life.

Complaint regarding use of disinfectants instead of a needle exchange programme in prisons to help prevent spread of infection examined under Articles 8 and 14 – declared inadmissible

24. DECISION IN THE CASE OF SHELLEY v. THE UNITED KINGDOM

(Application no. 23800/06)
4 January 2008

1. Principal facts

The applicant was born in 1972 and, at the time of this decision, serving a sentence in H.M. Prison Whitemoor.

Official studies demonstrated that intravenous drug-use was significant in prisons in the United Kingdom. Sharing syringes carried a risk of infection from viruses including HIV and Hepatitis C, which posed serious health risks, and could ultimately result in death. Prisons provided disinfectant tablets to clean needles in an attempt to reduce this infection risk, however studies demonstrated this was not as effective as needle exchange programmes (NEPs), which were offered to the general, but not the prison, population.

The applicant did not specify whether he was a drug user or had suffered from health impacts associated with the sharing of needles amongst inmates. He had sought permission for judicial review of the decision to provide disinfectant tablets instead of an NEP. This was refused and further rejected by the Court of Appeal, which noted there was no satisfactory evidence as to the additional benefits of NEPs compared with disinfectant schemes. Moreover, it was concerned that NEPs would conflict with Government policy to reduce drug use in prisons. It emphasised however the matter should be kept under review.

2. Decision of the Court

The applicant complained under Articles 2, 3 and 8 that the authorities failed to take steps to prevent a risk to his life, health and well-being through their refusal to introduce NEPs in prison. He further complained under Article 14 that he was discriminated against, since those in prison were treated less favourably than those in the community.

Articles 2, 3 and 8

The Court emphasised the complaint concerned the general situation in the prison system. Though it accepted there was sufficient evidence to demonstrate higher HIV and Hepatitis C infection rates in the prison population, it was not satisfied that the general unspecified risk, or fear, of infection was sufficiently severe as to raise issues under Articles 2 and 3.

It went on to consider the extent to which Article 8, in its protection of physical and moral integrity, may have required authorities to take particular preventive measures to counter infection rates in prisons. It accepted the applicant had the required victim status by virtue of being in prison, where there was a higher risk of HIV and Hepatitis C infection, and he could be affected by prison authority health policy. It noted however that there was no authority which placed any Article 8 obligation on a State to pursue a particular preventative health policy, as opposed to a general health policy. While the Court did not exclude the possibility that a positive obligation might arise to prevent the spread of a particular infection, it was not persuaded that any potential threat to health that fell short of Article 2 or 3 standards would impose a duty on a State to take specific preventative steps.

Matters of health care policy were within the margin of appreciation of domestic authorities. The applicant could not give a specific example of any negative direct effect on his private life, nor was he denied information or assistance concerning a threat to his health for which the authorities were responsible.

Giving due leeway to: decisions about resources and priorities, a legitimate policy to reduce drug use in prisons, preventative steps taken in the form of disinfectant tablets and that authorities were monitoring developments, the Court concluded that the Government had not failed to respect the applicant's private life under Article 8.

Therefore, this part of the application was rejected as being manifestly ill-founded and declared inadmissible.

Article 14 in conjunction with Article 8

The Court reiterated, for the purposes of Article 14, a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification. Moreover, States enjoy a margin

of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. It was noted that prisoners did not forfeit their Convention rights, though the manner and extent to which they could enjoy them was inevitably influenced by the context.

Whether the applicant could claim to be in an analogous position depended on the subject matter of his complaint. It was observed that the European Prison Rules, the Committee for the prevention of Torture (CPT) and the domestic prison regulations stated that health care in prisons should be the same as that in the community. Therefore, the Court was prepared to assume that prisoners could claim to be on the same footing as the community in regard to this issue.

The Court, however, concluded the difference in preventative policy fell within the State's margin of appreciation, was proportionate, and was supported by objective and reasonable justification. This conclusion was drawn from: States' enjoyment of a particularly wide margin of appreciation with regards to preventative measures; the absence of guidance from the CPT on NEPs specifically; the fact the risk of infection flowed primarily from prisoners' own conduct which they knew, or should have known, was dangerous to their health; policy considerations which led authorities to make disinfectants available; and the commitment to consider NEPs in the future through monitoring their provision elsewhere.

Therefore, this part of the application was also rejected as being manifestly ill-founded and declared inadmissible.

Failure to deal with the applicants' claim concerning their son's death violated the procedural aspect of Article 2

25. GRAND CHAMBER JUDGMENT IN THE CASE OF ŠILIH v. SLOVENIA

(Application no. 71463/01)
9 April 2009

1. Principal facts

Franja and Ivan Šilih were Slovenian nationals born in 1949 and 1940, living in Slovenj Gradec.

The applicants' son, Gregor Šilih, aged 20, died in hospital on 19 May 1993 after suffering anaphylactic shock, probably as a result of an allergic reaction to one of the drugs administered to him by a duty doctor in an attempt to treat his urticaria (hives).

On 13 May 1993 the applicants lodged a criminal complaint against the duty doctor for medical negligence, which was subsequently dismissed for lack of sufficient evidence.

On 1 August 1994, following the entry into force of the European Convention on Human Rights in respect of Slovenia, the applicants used their right under the Slovenian Criminal Procedure Act as an aggrieved party to act as prosecutors and lodged a request to launch a criminal investigation. The investigation was reopened on 26 April 1996 and an indictment lodged on 28 February 1997; the case was remitted twice for further investigation before the criminal proceedings were discontinued on 18 October 2000 on the ground, once again, of insufficient evidence. The applicants appealed unsuccessfully.

In the meantime, on 6 July 1995 the applicants also brought civil proceedings against the hospital and the doctor concerned. The first-instance proceedings, stayed between October 1997 and May 2001, were terminated with the claim being dismissed on 25 August 2006, more than 11 years after the proceedings were first instituted. During that period, the case was dealt with by at least six different judges. Subsequently, the applicants lodged an appeal and an appeal on points of law, both of which were unsuccessful.

At the time of the judgment of the European Court, the case was still pending before the Constitutional Court.

2. Decision of the Court

In its Chamber judgment of 28 June 2007, the Court held unanimously that there had been a violation of Article 2 of the Convention. On 27 September 2007 the Government requested that the case be referred to the Grand Chamber under Article 43 and the request was accepted.

The applicants complained about the inefficiency of the Slovenian judicial system in establishing liability for their son's death, in breach of the right to life in Article 2. Further relying on the right to a fair hearing in Article 6 and the right to an effective remedy in Article 13, they alleged that the legal proceedings were excessively lengthy and that the criminal proceedings were unfair.

Article 2

The Court first held that the applicants' procedural complaint essentially related to judicial proceedings which were conducted after the entry into force of the Convention with a view to establishing the circumstances in which the applicants' son had died and any responsibility for it. Hence, the alleged interference with Article 2 in its procedural aspect fell within the Court's temporal jurisdiction, and it confined itself to determining whether the events that occurred after the entry into force of the Convention in respect of Slovenia disclosed a breach of that provision.

The Court noted that the parties did not dispute the fact that Gregor Šilih's condition had started to significantly deteriorate in hospital and that his death had possibly been related to his medical treatment there. Given that the applicants alleged that their son had died as a result of medical negligence, the State, in order to comply with its obligations under Article 2, was required to set up an effective and independent judicial system to determine the cause of death and bring those responsible to account.

The applicants used two legal remedies, criminal and civil, with a view to establishing the circumstances of and liability for their son's death.

The Court considered that the excessive length of the criminal proceedings, and in particular the investigation, could not be justified by either the conduct of the applicants or the complexity of the case.

The civil proceedings, instituted on 6 July 1995, were, more than 13 years later, still pending before the Constitutional Court. Notably, although those proceedings had been stayed for three years and seven months pending the outcome of the criminal proceedings, they had in fact already been at a standstill for two years before that. Indeed, even after the criminal proceedings had been discontinued in October 2000, it took the domestic courts a further five years and eight months to rule on the applicants' civil claim.

The applicants' requests for a change of venue and for certain judges to stand down had admittedly delayed the proceedings to a degree; however, the delays that had occurred after the stay had been lifted had often not been reasonable. Certain hearings for example had been delayed by up to nine or ten months simply due to a change of venue or as a result of the case having been taken over by yet another judge. It was worth noting, the Court stated, that the sixth and final judge had concluded the first-instance proceedings in less than three months.

Lastly, it was unsatisfactory for the applicants' case to have been dealt with by at least six different judges in a single set of first-instance proceedings. While the domestic courts were better placed to assess whether an individual judge was able to sit in a particular case, a frequent change of the sitting judge had to have impeded effective processing.

The Court therefore concluded that the domestic authorities had failed to deal with the applicants' claim concerning their son's death with the level of diligence required by Article 2. Consequently, there had been a violation of Article 2 on account of the inefficiency of the Slovenian judicial system in establishing the cause of and liability for the death of the applicant's son.

Article 6 and 13

Given the reasoning which led the Court to finding a violation of Article 2, it held that there was no need to examine separately the case under Articles 6 and 13.

Article 41

The Court awarded the applicants €7,540 in respect of non-pecuniary damage and €4,039 for costs and expenses.

Detention of a mentally ill man in a prison, rather than in a medical institution, with inadequate living conditions and insufficient psychiatric care, violated Article 3 and Article 5 §§ 1,4 and 5

26. JUDGMENT IN THE CASE OF STRAZIMIRI v. ALBANIA

(Application no. 34602/16)
21 January 2020

1. Principal facts

The applicant was an Albanian national born in 1973. At the time of the European Court's judgment he had been detained in Tirana Prison Hospital since 2011.

The applicant was arrested in 2008 for attempted premeditated murder and committed to trial. The Tirana District Court found that the applicant had committed the offence, but that he was exempt from criminal responsibility on account of his mental illness, as he suffered from paranoid schizophrenia. The District Court ordered that the applicant receive "compulsory medical treatment in a medical institution" in accordance with Article 46 of the Criminal Code. The applicant was first sent to Kruja prison in 2009, and then transferred to Tirana Prison Hospital in 2011.

The applicant's situation was reviewed on several occasions between 2010 and 2014 by the Tirana District Court, Court of Appeal and Supreme Court. Each time, it was found that his compulsory medical treatment in a medical institution should be continued. This was justified by the applicant's state of health, his attempts to commit suicide and the inability of his family to ensure conditions appropriate to his state of health if he was released. In light of these factors, the District Court concluded at each review that the applicant's compulsory treatment in a medical institution was the only measure commensurate with the risk he posed, the need for continuous attention to his life and health, and the protection of his family members and members of the community.

On 17 September 2014, the applicant lodged a complaint to the District Court, in part relying on Articles 3 and 5 of the Convention. He requested an end to his confinement in the Prison Hospital and argued that since he was neither a convict, nor detained pending trial, his placement in a penal institution was contrary to domestic law. Instead, he should be placed in a special medical institution, as ordered by the District Court.

The applicant further claimed that his conditions of detention and the medical treatment he received in the Prison Hospital constituted inhuman and degrading treatment, that the prison facilities had been considered by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") as inhuman and degrading and that, under the protocol on the diagnostics and therapeutic care of schizophrenia adopted by the Ministry of Health, his illness should be treated by combining medication with other supporting therapies. At the time, his medical treatment mainly consisted of taking psychotropic drugs.

On 20 November 2014, both complaints were dismissed by the District Court as manifestly ill-founded. The District Court agreed with the submission of the prosecutors' office that the applicant's placement in the Prison Hospital was not contrary to law, as no special medical institutions for individuals subject to court-ordered compulsory medical treatment for mental disorders actually existed in Albania at the time. His confinement in a penal institution would not, therefore, be unlawful until such institutions were constructed.

The Court of Appeal upheld this decision and the applicant's appeal to the Supreme Court was still pending at the time the Court delivered its judgment.

2. Decision of the Court

The applicant alleged that the lack of adequate medical treatment during his detention, combined with the poor conditions of his detention, amounted to a violation of Article 3 of the Convention. He also alleged a breach of his rights under Article 5 §§ 1, 4 and 5 because his confinement in prison was not lawful or in accordance with law, he had not been given the possibility of having the lawfulness of his detention reviewed speedily by a court and he had not had access to an effective compensatory remedy in respect of his Article 5 complaints. He further alleged breaches of Articles 13 and 14.

Article 3

With regard to the conditions of detention, the Court took account of reports produced between 2015 and 2019 by the Albanian People's Advocate's Office and the CPT which found that Tirana Prison Hospital was in an advanced state of dilapidation, with widespread damp and almost a complete lack of central heating. The Court was also concerned by the inadequacy of the out-of-room

activities offered to patients. It considered that the applicant had been directly affected by the overall deterioration in the conditions of the institution.

With regard to the applicant's medical treatment, the Court stated that medical assistance will not be considered "adequate" simply because a detainee has been seen by a doctor and prescribed some form of treatment. Where necessitated by the nature of a condition, supervision needed to be regular, systematic and involve a comprehensive therapeutic strategy aimed at adequately treating a detainee's health problems. Although the applicant had been treated with a course of medication for his mental health problems, the Court found that there was no indication that there was a comprehensive therapeutic strategy, or individualised treatment plan in place for him.

The Court also held that it would take account of the vulnerability of the individual concerned, including their capacity to complain about the effects of any treatment. In response to the applicant's complaints, the Court found that both the domestic courts and the prosecuting authorities had simply acknowledged that no special medical institutions for the mentally ill who were ordered to have compulsory treatment by the courts existed in the country. The Court noted that, at least since 2014 the CPT had described many psychiatric patients such as the applicant as being in a state of "therapeutic abandonment".

The Court therefore concluded that the cumulative effect of the deterioration of the living conditions in which the applicant was confined since 2011 and the insufficient psychiatric and therapeutic treatment administered to the applicant amounted to inhuman and degrading treatment, in violation of Article 3.

Article 5 § 1

It was undisputed that the applicant's detention was covered by Article 5 § 1 (e) of the Convention. The Court therefore assessed whether his detention as a "person of unsound mind" had been "lawful", having regard to its findings under Article 3 and the appropriateness of the institution in which he was detained.

The Court stated that there was a close link between the "lawfulness" of the detention of persons suffering from mental disorders and the appropriateness of the treatment provided for their mental condition, including the administration of suitable therapy. The Court affirmed that any detention of a mentally ill person must have a therapeutic purpose, aimed at curing or alleviating their

mental-health condition including, where appropriate, reducing or controlling their dangerousness. The Court would, as such, verify whether an individualised programme had been put in place, taking account of the specific details of a detainee's mental health with a view to preparing him or her for possible future reintegration into society.

The Court considered the CPT's reports which repeatedly criticised the placement of "persons of unsound mind" who were exempted from criminal responsibility in penal facilities and highlighted that the Prison Hospital was not an appropriate institution for the detention of mentally ill individuals who were subject to court-ordered compulsory medical treatment. The Court also had regard to the People's Advocate's observations that the detention of such individuals in penal facilities was in breach of domestic law, which stated that they should be placed in a special medical institution, integrated into the health system instead of the penal system.

This longstanding failure of the Albanian authorities to set up such an institution, in apparent contravention of their domestic statutory obligations since 2012, was found to be indicative of a wider structural problem, which remained unaddressed.

Finally, the Court noted that the authorities had failed to consider alternative means of placing the applicant outside of penal facilities, for example in a civilian mental health facility. Instead, they repeatedly limited themselves to finding that the applicant's family was not capable of offering conditions appropriate to his illness.

The Court therefore found that the applicant had not been offered the therapeutic environment appropriate for a person detained as having mental disorders, and his continued deprivation of liberty was unlawful and breached the requirements of Article 5 § 1 (e) of the Convention.

Article 5 § 4

The Court found that questions of compatibility with this right must be determined in light of the circumstances of each case, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the applicant. The Court considered that the delay of more than three years to address the applicant's appeal before the Supreme Court

was entirely attributable to the authorities. The proceedings were not, therefore, compatible with the right, guaranteed under Article 5 § 4, to a speedy judicial decision concerning the lawfulness of detention. Accordingly, there had been a violation of Article 5 § 4.

Article 5 § 5

The Court concluded that the applicant did not have an enforceable right to compensation in respect of the violations of Articles 5 §§ 1 and 4, meaning there had also been a breach of Article 5 § 5 of the Convention.

Articles 13 and 14

The Court considered that, having regard to its findings under Articles 3 and 5, it was unnecessary to examine separately the complaints under Articles 13 and 14.

Article 46

In respect of the applicant, the Court held that the authorities should secure as a matter of urgency the administration of suitable and individualised forms of therapy and consider the possibility of his placement in an alternative setting outside of the penal facilities.

The Court also held that the respondent State should create an "appropriate institution" to secure appropriate living conditions and the provision of adequate health care services to mentally ill persons who are subject to a deprivation of liberty on the basis of court-ordered compulsory medical treatment. Such institution should comply with the therapeutic purpose of this form of deprivation of liberty.

Article 41

The Court awarded €15,000 to the applicant in respect of non-pecuniary damage and €2,500 in respect of costs and expenses.

III. Expulsion and extradition

Failure of the authorities to consider the health of the applicant and the impact of his removal on his family life during removal proceedings constituted violations of Article 3 and Article 8

27. GRAND CHAMBER JUDGMENT IN THE CASE OF PAPOSHVILI v. BELGIUM

(Application no. 41738/10)
13 December 2016

1. Principal facts

The applicant, Georgie Paposhvili, was a Georgian national who was born in 1958 and lived in Brussels. He died on 7 June 2016. On 20 June 2016 the applicant's wife and her three children expressed the wish to pursue the proceedings before the Court.

Mr Paposhvili arrived in Belgium on 25 November 1998, accompanied by his wife and their six-year-old child. The couple subsequently had two more children. Between 1998 and 2007 Mr Paposhvili was convicted of a number of offences, including robbery with violence and participation in a criminal organisation. While serving his various prison sentences, Mr Paposhvili was diagnosed with a number of serious medical conditions, including chronic lymphocytic leukaemia and tuberculosis, for which he received hospital treatment. He submitted several unsuccessful applications for regularisation of his residence status on exceptional or medical grounds relying on Articles 3 and 8 and alleging that he would be unable to obtain treatment if he were sent back to Georgia.

In August 2007 the Minister for the Interior issued a deportation order directing the applicant to leave the country, and barred him from re-entering Belgium for ten years on account of the danger he posed to public order. The order became enforceable once Mr Paposhvili had completed his sentence but was not in fact enforced, as he was undergoing medical treatment. On 7 July 2010 the Aliens Office issued an order for him to leave the country, together with an order for his detention. He was transferred to a secure facility for illegal immigrants with a view to his return to Georgia, and travel papers were issued for that purpose.

On 23 July 2010 Mr Paposhvili applied to the European Court of Human Rights for an interim measure under Rule 39 of its Rules of Court suspending his removal; the request was granted. He was subsequently released. The time-limit for enforcement of the order to leave Belgian territory was extended several times. In November the applicant's wife and the three children were granted indefinite leave to remain in Belgium. Between 2012 and 2015 Mr Paposhvili was arrested on several occasions for shoplifting.

2. Decision of the Court

The applicant, relying on the right to life under Article 2 and the prohibition of inhuman or degrading treatment under Article 3, alleged that substantial grounds had been shown for believing that if he had been expelled to Georgia, he would have faced a real risk of inhuman and degrading treatment and of a premature death. He also complained, under Article 8, that removal would have resulted in his separation from his family, who constituted his sole source of moral support.

A Chamber of the Court held on 17 April 2014 that there had been no violations of Article 2, 3 or 8. On 20 April 2015 the panel of the Grand Chamber accepted a request on behalf of the applicant for the case to be referred to the Grand Chamber under Article 43 of the Convention. The Court found that given the nature of the claims and the role of the Convention system, it was not barred from hearing the case, despite the fact that the applicant had died.

Articles 2 and 3

The Court reaffirmed the right of all Contracting States to control the entry, residence and expulsion of aliens. However, if there are substantial grounds for believing that the person concerned, upon expulsion, would face a real risk of being subjected to torture or inhuman or degrading treatment, Article 3 requires that the person must not be expelled. What is considered to be ill-treatment depends on the circumstances of the case, such as the duration of the treatment, its physical and mental effects, and in some cases, the sex, age and state of health of the victim. Suffering flowing from a naturally occurring illness may also be covered by Article 3, where it risks being exacerbated by treatment for which the authorities can be held responsible.

The Court, after examining its case-law, concluded that the application of Article 3 by the Court to date did not afford sufficient protection to aliens who

were seriously ill (as opposed to being close to death). The Court considered that the term "other very exceptional cases" used in previous case law which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.

The State is obliged to assess the risks that the applicant would face if removed to the receiving country in order to comply with their negative obligation not to expose persons to a risk of ill-treatment. The State must verify whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness and whether the person in question will actually have access to this care. If serious doubts persist regarding the impact of removal, the returning State must obtain individual and sufficient assurances from the receiving State that appropriate treatment will be available to the individual. Here, the applicant had provided extensive medical information, detailing how the treatment in Belgium had made his condition stable and that if the treatment was discontinued, his life expectancy would have been less than six months. The applicant had also submitted that neither the treatment, nor the donor transplant, were available in Georgia.

Despite the above facts, the applicant's requests for regularisation on medical grounds were refused by the Aliens Office. The Aliens Appeals Board held that, where the administrative authority advanced grounds for exclusion, it was not necessary for it to examine the medical evidence submitted to it. With regard to the complaints based on Article 3 of the Convention, the Aliens Appeals Board further noted that the decision refusing leave to remain had not been accompanied by a removal measure, with the result that the risk of the applicant's medical treatment being discontinued in the event of his return to Georgia was purely hypothetical. The Conseil d'État, to which the applicant appealed on points of law, upheld the reasoning of the Aliens Appeals Board.

The Court, therefore, concluded that because the applicant's medical certificates had not been examined by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 during the regularisation or removal proceedings, had the applicant been returned to Georgia, there would have been

a violation of Article 3. The Court, thus, held it to be unnecessary to consider Article 2 of the Convention.

Article 8

In the context of the proceedings for regularisation on medical grounds, the Aliens Appeals Board had dismissed Mr Paposhvili's complaint under Article 8 on the ground that the decision refusing him leave to remain had not been accompanied by a removal measure. Nevertheless, the Court considered that it had been up to the national authorities to conduct an assessment of the impact of removal on Mr Paposhvili's 152 The Prohibition Against Torture, Inhuman or Degrading Treatment or Punishment family life in the light of his state of health; this constituted a procedural obligation with which the authorities had to comply in order to ensure the effectiveness of the right to respect for family life. The State should have examined whether, at the time of the removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of Mr Paposhvili's right to respect for his family life required that he be granted leave to remain in Belgium, for the time he had left to live. Thus, the Court held that if Mr Paposhvili had been removed to Georgia without these factors having been assessed, there would also have been a violation of Article 8 of the Convention.

Article 41

The Court held that its conclusion concerning Articles 3 and 8 constituted sufficient just satisfaction in respect of any non-pecuniary damage that Mr Paposhvili might have sustained. It also held that Belgium was to pay Mr Paposhvili's family €5,000 in respect of costs and expenses.

IV. Restrictive measures and detention

Containment within police cordon during violent demonstration did not amount to deprivation of liberty

28. GRAND CHAMBER JUDGMENT IN THE CASE OF AUSTIN AND OTHERS v. THE UNITED KINGDOM

(Application no. 39692/09)
15 March 2012

1. Principal facts

The four applicants in this case were Lois Austin, a British national born in 1969; George Black, a Greek and Australian national born in 1949; Bronwyn Lowenthal a British and Australian national born in 1972; and, Peter O'Shea, a British national born in 1963.

The police became aware that on 1 May 2001 activists from environmentalist, anarchist and left-wing protest groups intended to stage various protests based on locations from the Monopoly board game. The organisers of the "May Day Monopoly" protest did not make any contact with the police or attempt to seek authorisation for the demonstrations. By 2 p.m. on that day there were over 1,500 people in Oxford Circus in central London and more were steadily joining them. The police, fearing public disorder, took the decision at approximately 2 p.m. to contain the crowd and cordon off Oxford Circus. Controlled dispersal of the crowd was attempted throughout the afternoon but proved impossible as some members of the crowds both within and outside the cordon were very violent, breaking up paving slabs and throwing debris at the police. The dispersal was completed at around 9.30 p.m.

Ms Austin, a member of the Socialist Party and a frequent participant in demonstrations, attended the protest on 1 May 2001 and was caught up in the Oxford Circus cordon. Mr Black wanted to go to a bookshop on Oxford Street but, diverted by a police officer on account of the approaching demonstrators, met a wall of riot police and was forced into Oxford Circus where he remained until 9.20 p.m. Similarly, Ms Lowenthal and Mr O'Shea had no connection with the demonstration. Both on their lunch-break, they were held within the cordon until 9.35 p.m. and 8 p.m., respectively.

In April 2002 Ms Austin brought proceedings against the Commissioner of Police of the Metropolis, claiming damages for false imprisonment and for a breach of her rights under Article 5 of the European Convention of Human Rights. In March 2005 her claims were dismissed. Her subsequent appeals were then also dismissed both by the Court of Appeal and finally in January 2009 by the House of Lords. The House of Lords concluded that Ms Austin had not been deprived of her liberty and that Article 5 of the Convention did not therefore apply.

2. Decision of the Court

The applicants complained that they were deprived of their liberty without justification, in breach of Article 5 § 1.

Article 5

The Court observed that this was the first time it was called on to consider the application of the Convention in respect of the "kettling" or containment of a group of people carried out by the police on public order grounds. Consequently, it first had to assess whether the applicants had been deprived of their liberty, within the meaning of Article 5 § 1.

The Court referred to a number of general principles established in its case law. First, the Convention was a "living instrument", which had to be interpreted in the light of present day conditions. Even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Secondly, the Convention had to be interpreted harmoniously, as a whole. It had to be taken into account that various Articles of the Convention placed a duty on the police to protect individuals from violence and physical injury. Thirdly, the context in which the measure in question had taken place was relevant. Members of the public were often required to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match.

The Court did not consider that such commonly occurring restrictions could properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, so long as they were rendered unavoidable as a result of circumstances beyond the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose. The Court

further emphasised that, within the Convention system, it was for the domestic courts to establish the facts and the Court would generally follow the findings of facts reached by the domestic courts.

In this case, the Court based itself on the facts established by the High Court, following a three week trial and the consideration of substantial evidence. It was established that the police had expected a hard core of between 500 and 1000 violent demonstrators to gather at Oxford Circus at around 4 p.m. The police had also anticipated a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. Given that, about two hours earlier, over 1,500 people had already gathered there, the police had decided to impose an absolute cordon.

There had been space within the cordon for people to walk about and there had been no crushing. However, the conditions had been uncomfortable with no shelter, food, water or toilet facilities. Although the police had tried, continuously throughout the afternoon, to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon. As a result, the police had only managed, at about 9.30 p.m., to complete the full dispersal of the people contained. In the circumstances, an absolute cordon had been the least intrusive and most effective means available to the police to protect the public, both within and outside the cordon, from violence. Consequently, it did not amount to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty.

Furthermore, the Court was unable to identify a moment when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. Indeed, five minutes after the cordon was imposed, the police had been planning to start a controlled dispersal. Shortly afterwards, and fairly frequently thereafter, the police had made further attempts to start dispersing people and had kept the situation under permanent close review. As the same dangerous conditions at the origin of the absolute cordon had continued to exist throughout the afternoon and early evening, the Court found that the people within the cordon had not been deprived of their liberty within the meaning of Article 5 § 1. Notwithstanding the above finding, the Court emphasised the fundamental importance of freedom of expression and assembly in all democratic societies

and underlined that national authorities should not use measures of crowd control to stifle or discourage protest, but rather only when necessary to prevent serious injury or damage.

Since Article 5 did not apply, the Court held that there had been no violation of that provision.

Relevant and sufficient reasons to be given "promptly" after the arrest for detention and house arrest – violation of Article 5 § 3

29. GRAND CHAMBER JUDGMENT IN THE CASE OF BUZADJI v. THE REPUBLIC OF MOLDOVA

(Application no. 23755/07)
5 July 2016

1. Principal facts

The applicant, Petru Buzadji, was a Moldovan national born in 1947 and living in Comrat.

The applicant was a minority shareholder in and the CEO of a liquefied gas supply company from southern Moldova. In July 2006 a criminal investigation was initiated in respect of an alleged unsuccessful attempt by the applicant to commit fraud in connection with his activity at the company. During the ten-month investigation that followed, Mr Buzadji appeared before the investigating authorities each time he was summoned and cooperated with them. Mr Buzadji's sons were also suspects in the criminal proceedings but were not arrested.

On 2 May 2007 the applicant was arrested and on 5 May 2007 he was formally charged with the attempted large-scale misappropriation of goods belonging to the company where he worked. On the same day, the Buiucani District Court ordered the applicant's detention pending trial for a period of fifteen days, in light of the seriousness of the offence and the complexity of the case, and in view of the fact that reasonable grounds substantiated a risk of collusion, namely with his sons. The District Court dismissed as unsubstantiated and improbable the other reasons relied upon by the prosecutor, namely the risk of absconding and influencing witnesses or that of destroying evidence. The District Court's decision was later upheld by the Court of Appeal on the same grounds.

Mr Buzadji's detention was subsequently extended on several occasions despite his repeated requests for release, which included health reasons. In particular, his detention was first extended by fifteen days on 16 May 2007 and then by another twenty days on 5 June 2007. Both decisions, later upheld by the Court of Appeal, were delivered on the grounds of the seriousness and complexity of the case, the danger of the applicant's absconding and the risk of him influencing witnesses and

tempering with evidence. Following the prosecutor's third request for prolongation of the applicant's detention, the District Court, considering the length of time that Mr Buzadji had already spent in detention pending trial – at the time, fifty-five days – as well as his participation in all the necessary investigative actions, ordered that he be placed under house arrest for thirty days. After three days of house arrest, however, the Court of Appeal quashed this decision and ordered the applicant's detention pending trial for twenty days. On the prosecutor's fourth request, this detention was subsequently extended by another twenty days by the District Court on 16 July 2007, in view of the seriousness of the offence and the risk of Mr Buzadji absconding or hindering the investigation. Ultimately, on 20 July 2007, the Court of Appeal accepted Mr Buzadji's request to be placed under house arrest, which was further prolonged in December 2007 by ninety days. Finally, in March 2008 the Comrat District Court decided to release the applicant on bail.

On 9 June 2011 Mr Buzadji was acquitted of the charges for which he had been detained between 2 May 2007 and 12 March 2008. The applicant's sons were also acquitted.

2. Decision of the Court

On 16 December 2014, a Chamber of the Court found that there had been a violation of Article 5 § 3 of the Convention. On the Government's request, the case was referred to the Grand Chamber under Article 43.

The applicant complained that his deprivation of liberty pending trial, including both his detention in custody and his placement under house arrest, had not been based on relevant and sufficient reasons in violation of Article 5.

Admissibility

The Court dismissed the Government's preliminary objection concerning the non-exhaustion of domestic remedies on the grounds that this objection was only raised before the Grand Chamber and no exceptional circumstances had been invoked to allow the objection to be raised at such late stage of the proceedings.

Article 5 § 3

The Court reiterated that the persistence of a reasonable suspicion was a condition sine qua non for the validity of the continued detention, but did not

suffice to justify the prolongation of the detention after a certain lapse of time, after which other "relevant and sufficient" reasons to detain the suspect were required. The Court acknowledged that it had not previously defined or set any criteria for the application of the vague notion of "a certain lapse of time" upon which the second set of guarantees under Article 5 § 3 depended, and went on to further develop its relevant case-law in light of the present case.

In particular, the Court found that there were compelling arguments for synchronising the second limb of guarantees with the first one, which in turn implied that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applied already at the time of the first decision ordering detention on remand, that is to say "promptly" after the arrest.

The Court further reiterated that house arrest was considered, in view of its degree and intensity, to amount to a deprivation of liberty within the meaning of Article 5, and that there was no reason to depart from its case-law in this case. It dismissed the Government's argument that the applicant's request to be placed under house arrest and his subsequent omission to challenge the measure amounted to a waiver of his right to liberty, and, that thus the applicant could not claim to be a "victim" in the sense of Article 34 for the purposes of his complaint under Article 5 § 3 about his house arrest. In that regard, the Court found that the applicant's house arrest could not be equated to release from detention, nor could it be viewed as a form of reparation complying with the requirement under Article 5 § 5 to afford a right to compensation.

The Court also dismissed the Government's submission that lesser reasons were required in order to justify house arrest than detention in an ordinary remand facility, noting that no distinction of regime between different types of detention had been made in its previous case-law. It reiterated that the notions of "degree" and "intensity" as criteria for the applicability of Article 5 referred only to the degree of restrictions to the liberty of movement, not to the differences in different places of detention. Accordingly, the Court applied the same criteria for the entire period of deprivation of liberty, irrespective of the place where the applicant was detained.

Turning to the justifications provided for the applicant's provisional detention in the present case, the Court found that the reasons invoked by the domestic courts for ordering and prolonging the applicant's detention were stereotyped and

abstract as well as inconsistent. Neither in the initial order to detain the applicant on remand nor in the subsequent decisions prolonging his detention was there an indication that the domestic courts took into account the applicant's character, his morals, his assets and links with the country and his behaviour during the first ten months of the criminal investigation. Furthermore, in the first and second time of the prolongation, as well as in the decision with which the Court of Appeal quashed the first-instance court's decision to place the applicant under house arrest following the prosecutors' third request, the courts relied on reasons that both the first-instance court and the Court of Appeal when ruling on the initial order to detain the applicant on remand had dismissed as unsubstantiated and improbable. Even on the occasions (in June and July 2007) where they accepted that there were no grounds militating for the applicant's continued detention, the domestic courts moved on to order his house arrest.

In view of the above considerations, the Court found that no relevant and sufficient reasons to order and prolong the applicant's detention pending trial had been given and, thus, there was a violation of Article 5 § 3.

Article 41

The Court awarded the applicant €3,000 in respect of non-pecuniary damage and €4,837 for costs and expenses.

National law did not define with sufficient clarity the content of the preventative measures which could be imposed on an individual in violation of the right to freedom of movement in Article 2 of Protocol 4

30. GRAND CHAMBER JUDGMENT IN THE CASE OF DE TOMMASO v. ITALY

(Application no. 43395/09)
23 February 2017

1. Principal facts

The applicant was an Italian national born in 1963.

Under Italian law (Act. No. 1423/1956), certain preventative measures could be imposed against "persons presenting a danger for security and public morality". Such persons included those who "may be regarded as habitual offenders", as "living habitually, even in part, on the proceeds of crime" and as "posing a threat to health, security or public order". The Italian Constitutional Court had on several occasions clarified the criteria to be used for assessing whether preventative measures were necessary. It had held that mere suspicions did not suffice, but rather that factual evidence indicating a real and not merely theoretical danger must be established.

On 11 April 2008, the Bari District Court placed the applicant under special supervision for two years. This was based on the applicant's previous convictions for drug trafficking, absconding and unlawful possession of weapons, which showed that he associated with criminals and was a dangerous individual. The preventative measure imposed various obligations, such as (1) to report once a week to the police authority, (2) not to change his place of residence (3) to lead an honest and law-abiding life and not give cause for suspicion (4) not to return home later than 10 p.m. or to leave home before 6 a.m. (5) not to go to bars, nightclubs or attend public meetings, and (6) not to use mobile phones or radio communication devices.

On 28 January 2009, the Court of Appeal quashed the preventative measure, as it did not consider that the requirement of a "current" danger to society had been established; the applicant's most recent illegal activities relating to drugs related back to five years before the preventative measure had been imposed. It also held

that the District Court had omitted to assess the impact of the rehabilitation purpose of the sentence on the applicant's personality.

Despite the favourable outcome of the applicant's proceedings, he was still placed under special supervision for 221 days due to the Bari Court of Appeal's failure to comply with the statutory 30 day time-limit for giving its decision.

2. Decision of the Court

The applicant alleged, in particular, that the preventive measures to which he had been subjected for a period of two years were in breach of Articles 5, 6 and 13 of the Convention and of Article 2 of Protocol No. 4.

Article 5

The government disputed the applicability of Article 5 on the grounds that the preventative measures did not amount to a deprivation of liberty within the meaning of Article 5.

The Court referred to its past case law on the meaning of "deprivation of liberty". It reiterated that the factors to take into account include the type, duration, effects and manner of implementation of the measure concerned and that the difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance. Applying this to the case at hand, the Court did not accept that the requirement not to leave the house at night amounted to house arrest and hence to deprivation of liberty. Some of the key factors leading to this decision included that there were no restrictions on the applicant's freedom to leave home during the day, he was able to have a social life, to maintain relations with the outside world and to make social contacts.

The Court referred to analogous cases, concerning compulsory residence orders and requirements not to leave the house at night which it had held not to amount to a deprivation of liberty, but rather to restrictions of liberty of movement, and found that there was no reason to change its approach in this case. Further, the Court found that, unlike in cases where the Court had found a deprivation of liberty, in this case the applicant was not forced to live within a restricted area, and there was nothing to indicate that the applicant had ever applied to the authorities for permission to travel away from his place of residence. This could be

contrasted to the case of *Guzzardi v Italy*[755] where the Court had concluded that the applicant had been "deprived of his liberty" as he had been forced to live on an island within an area of 2.5 sq. km, under almost permanent supervision and where it had been almost completely impossible for him to make social contacts. The Court therefore proceeded to examine the applicant's claim in this case under Article 2 of Protocol No. 4.

Article 2 of Protocol No. 4

The Court reiterated that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement within a given territory and the right to leave that territory, which implies the right to travel to a country of the person's choice to which he or she may be admitted. The Court considered the restrictions imposed on the applicant to be measures restricting the right to liberty of movement for the purposes of Article 2 of Protocol No. 4. It therefore proceeded to consider whether they were in accordance with law, pursued one of the legitimate aims referred to in the third paragraph of Article 2 of Protocol No. 4 and struck a fair balance between the public interest and the individual's rights.

The Court reiterated its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure have a basis in domestic law, but also refers to the quality of the law in question, requiring it to be accessible to the persons concerned and foreseeable as to its effects. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; the person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, such consequences need not be foreseeable with absolute certainty; many laws, in order to avoid excessive rigidity, are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and applications are questions of practice. The level of precision required of domestic legislation depends to a considerable degree on its content and the field it is designed to cover and the number and status of those to whom it is addressed. Furthermore, the Court reiterated that a law conferring a discretion on a public authority must indicate the scope of that discretion, although not necessarily the detailed procedures and conditions to be observed.

[755] See *Guzzardi v. Italy*, judgment of 6 November 1980, no. 7367/76 (included as a summary in this publication).

Applying these principles to the present case, the Court firstly noted that the preventative measures in issue had a legal basis in domestic law, namely Act. No. 1423/1956, as interpreted in the light of the Constitutional Court's judgments. The Court noted that accessibility and foreseeability of the effects of the Act were especially important in a case such as the present one, where the legislation had a very significant impact on the applicant and his right to liberty of movement. The Court acknowledged that the Italian Constitutional Court had on several occasions clarified the criteria to be used for assessing whether preventative measures are necessary. However, the imposition of such measures remained linked to a prospective analysis by the domestic courts as neither the Act nor the Constitutional Court had clearly identified the "factual evidence" or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual. Hence, the Act did not contain sufficiently detailed provisions as to what types of behaviour were to be regarded as posing a danger to society. Noting that the District Court had based its decision on the existence of "active" criminal tendencies on the part of the applicant, without attributing any specific behaviour or criminal activity to him, the Court also considered that the Act did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts.

As regards the measures provided for in the Act that were applied to the applicant, the Court observed the vague and indeterminate phrasing of some of them, such as the obligation to "lead an honest and law-abiding life" and to "not give cause for suspicion". Despite an interpretive aid provided by the Constitutional Court, it was not possible for the applicant to ascertain their precise content. His case had preceded Constitutional Court's guidance, and in any case, any interpretation on that criterion would not have solved the problem of lack of foreseeability, since the legislative Act allowed the District Court to also impose any measures it deemed necessary – without specifying their content – in view of the requirements of protecting society.

The Court therefore considered that the relevant part of the Act did not define with sufficient clarity the content of the preventative measures which could be imposed even in the light of the Constitutional Court's case law. The interference with the applicant's liberty of movement could hence not be said to have been based on legal provisions complying with the Convention requirements of lawfulness, and there had been a violation of Article 2 of Protocol No. 4.

Article 6

The Court also noted that there had been a violation of Article 6(1) on account of the applicant's hearings having not been held in public. With regard to the alleged unfairness of the proceedings, however, the procedural safeguards, as evidenced by the Court of Appeal's judgment, had as a whole guaranteed the applicant a fair hearing.

Article 13

Having regard to the applicant's ability to appeal to the Court of Appeal, which subsequently quashed the special supervision, the Court considered that the applicant had an effective remedy under Italian law affording him the opportunity to raise his complaints of Convention violations.

Article 41

The applicant was awarded €5,000 in respect of non-pecuniary damages and €11,525 in respect of costs and expenses, including for those incurred before the domestic courts.

Compulsory isolation of HIV infected person violated the right to liberty in Article 5

31. JUDGMENT IN THE CASE OF ENHORN v. SWEDEN

(Application no. 56529/00)
25 January 2005

1. Principal facts

The applicant was a Swedish national, Eie Enhorn, born in 1947. In 1994 it was discovered that he was infected with the HIV virus and that he had transmitted the virus to a 19-year-old man with whom he first had sexual contact in 1990. In light of this, a county medical officer issued instructions to the applicant pursuant to the 1988 Infectious Diseases Act (the "1998 Act"), which were aimed at preventing him from spreading the HIV infection. He was required to inform any potential sexual partners about his infection, to wear a condom and to abstain from consuming an amount of alcohol which could impair his judgment and cause him to put others at risk. He was also required to inform medical staff and his dentist about his infection before he underwent procedures such as physical examinations, vaccinations or blood tests and was obliged to visit his consulting physician and attend medical appointments fixed by the county medical officer.

Between September 1994 and November 1994, the applicant attended four appointments with the county medical officer and received two home visits. However, on five occasions, he failed to appear as summoned. The county medical officer therefore applied to the County Administrative Court for a court order that the applicant be kept in compulsory isolation in a hospital for up to three months. In a judgment of 16 February 1995, the County Administrative Court found that the applicant had failed to comply with the measures prescribed by the county medical officer, and ordered that he should be kept in compulsory isolation for up to three months pursuant to section 38 of the 1988 Act. Whilst isolated, the applicant was entitled to go outdoors at least once a day, but only if he was accompanied by hospital staff members.

Thereafter, orders to prolong his deprivation of liberty were continuously issued every six months until 12 December 2001. Since the applicant absconded several times, his actual deprivation of liberty lasted from 16 March 1995 until 25 April 1995, 11 June 1995 until 27 September 1995, 28 May 1996 until 6 November

1996, 16 November 1996 until 26 February 1997, and 26 February 1999 until 12 June 1999 – almost one and a half years altogether.

On 12 December 2001 an application to further extend the order was turned down by the County Administrative Court, which referred to the fact that the applicant's whereabouts were unknown and that therefore no information was available regarding his behaviour, state of health and so on. It appeared at the time of the judgment of the European Court that since 2002 the applicant's whereabouts had been known, but that the competent county medical officer made the assessment that there were no grounds for the applicant's further involuntary placement in isolation.

2. Decision of the Court

The applicant complained that the compulsory isolation orders and his involuntary placement in hospital had been in breach of Article 5 § 1 of the Convention.

Article 5 § 1

Being satisfied that the applicant's detention had a basis in Swedish law, the Court proceeded to examine whether the deprivation of the applicant's liberty amounted to "the lawful detention of a person in order to prevent the spreading of infectious diseases" within the meaning of Article 5 § 1 (e) of the Convention.

The Court emphasised that it does not suffice for a deprivation of liberty to be in accordance with national law, it must also comply with the general principle of legal certainty, meaning that the conditions for detention must be clearly defined and the relevant national law must be sufficiently accessible and precise to be foreseeable.

The Court stated that it had "only to a very limited extent" decided on cases where a person has been detained "for the prevention of the spreading of infectious diseases". It therefore drew comparisons from the case law on the other grounds for deprivation under Article 5 § 1 (e) (namely: persons of unsound mind, alcoholics or drug addicts or vagrants). The Court found that there was a link between those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. The Court stated therefore that

it was legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in Article 5 § 1 (e) to be deprived of their liberty was not only that they were a danger to public safety but also that their own interests may have necessitated their detention.

In light of this, the Court also found that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. For example, the detention of a person as a mental health patient will only be lawful for the purposes of sub-paragraph (e) if effected in a hospital, clinic or another appropriate institution.

The Court found that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" were whether the spreading of the infectious disease was dangerous for public health or safety, and whether detention of the person infected was the last resort in order to prevent the spreading of the disease, inasmuch as less severe measures had been considered and found to be insufficient to safeguard the public interest. When those criteria were no longer fulfilled, the basis for the deprivation of liberty ceased to exist. It did not suffice therefore if a deprivation of liberty in this context was lawful, it also needed to be necessary.

In the case under review, it was undisputed that the first criterion was fulfilled, in that the HIV virus was dangerous for public health and safety. With respect to the second criterion, the Court noted that the Government had not provided any examples of less severe measures which might have been considered for the applicant in the period from 16 February 1995 until 12 December 2001, but had turned out to be insufficient to safeguard the public interest.

Among other things, despite his being at large for most of the period from 16 February 1995 until 12 December 2001, there was no evidence or indication that during that period the applicant had transmitted the HIV virus to anybody, or that he had sexual intercourse without first informing his partner about his HIV infection, or that he did not use a condom, or that he had any sexual relationship at all for that matter. He had visited physicians twice during the period he absconded from 1997 to 1999, and on both occasions he informed them about his HIV infection. He therefore appeared to have acted in compliance with many of the instructions issued to him by the county medical officer in 1994.

In those circumstances, the Court found that the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus after less severe measures had been considered and found to be insufficient to safeguard the public interest. Moreover, by extending over a period of almost seven years the order for the applicant's compulsory isolation, with the result that he had been placed involuntarily in a hospital for almost one and a half years in total, the authorities had failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty. There had accordingly been a violation of Article 5 § 1 of the Convention.

Article 41

The Court awarded the applicant €12,000 for non-pecuniary damage and €2,083 for costs and expenses.

The applicant's detention for over 19 hours and the judicial delay in reviewing his detention violated his right to liberty under Article 5 § 1 (b)

32. JUDGMENT IN THE CASE OF EPPLE v. GERMANY

(Application no. 77909/01)
24 March 2005

1. Principal facts

The applicant was born in 1970 and lived in Wasserburg, Germany. On 18 July 1997 a folk festival was held on Lindau Island. The seventh Lindau Chaos Day (an annual gathering of punks, aimed at creating chaos and disturbance) had been scheduled for the same date but was banned by a general ordinance of 14 July 1997 due to the risk of threats to public safety and order.

At about 6 p.m. the applicant was asked by the police to leave the festival site, but allegedly refused. On account of that refusal, his punk-like appearance and the fact that the central police database showed that he had already attended past Chaos Days both in Lindau and other towns, the police told him to leave the island and not to return for the duration of the weekend. The applicant reportedly refused to comply and was taken to the police station, where he was held for approximately 19 hours. The applicant maintained that he had not refused to leave the festival site but had asked the name of the police officer and the reasons for the order.

On 19 July 1997 the Lindau District Court ordered his release but ruled that his detention had been lawful. The judge who ordered his release had arrived to court an hour and a half late and was due to examine the detention of 17 persons, which meant the applicant's case was heard at approximately 1:45 p.m..

On appeal, the Kempten Regional Court held that the applicant's detention was justified by his refusal to leave the festival site, the violence often involved with Chaos Day events, the applicant's appearance, and his record of attendance at past Chaos Day events. It also held that his case had been heard by the District Court as soon as possible in accordance with the Police Act. The Supreme Court of Bavaria upheld this decision and the Constitutional Court rejected the applicant's appeal without reasons.

2. Decision of the Court

The applicant alleged that his arrest and detention violated his right to liberty and security under Article 5 of the Convention and his right to freedom of expression under Article 10. He also alleged that he had been treated in a discriminatory manner on account of his punk-like appearance, in violation of Article 14.

Article 5

The Court found that the applicant's arrest and initial detention by the police was effected to secure the fulfilment of an obligation prescribed by law, by preventing the applicant from breaching the general ordinance prohibiting Chaos Days, in accordance with Article 5 § 1 (b). However, for the detention to be justified under this provision, the legal obligation needed to be concrete and specific, the person detained had to have failed to comply with the legal obligation and the purpose of the arrest and detention needed to be to secure compliance with the obligation, rather than to be punitive. Further, the person's detention needed to cease as soon as the legal obligation was fulfilled. The State was also required to demonstrate that the detention was "necessary in a democratic society".

The applicant maintained that he did not refuse to leave the festival site but stayed to obtain the name of the police officer and the reasons for the order. However, with reference to the witness statements before the Kempten Regional Court, the Court considered that this claim was unsubstantiated. The national authorities, in particular the courts, were in a better position to apply and interpret domestic law. Therefore, the Court held that the applicant's arrest and initial detention by the police complied with Article 5 § 1 (b).

As to the length of the detention, it noted that the applicant had been held for more than 19 hours, as the Lindau District Court judge on duty on 19 July 1997 had arrived late (at about 11.30 a.m. instead of 10 a.m.) and had had to consider applications by a total of 17 people concerning the lawfulness of their detention. The Court noted that there had been no formal failure to comply with the domestic statutory time-limit on detention, as the Police Act stated that in the absence of a court order for their continued detention, persons in police custody were to be released at the latest at the end of the day following their arrest. It was not however the Court's task to rule *in abstracto* on the legality of the maximum detention period provided for under national law. Rather, it was for

the Court to consider whether the length of the applicant's detention had been proportionate to its aim. In doing so the Court took into account that the offence for which the applicant was arrested (refusing to comply with an order to leave Lindau Island for the weekend) carried a maximum fine of €250.

In light of the circumstances of the case and the importance of the right to liberty under the Convention, the Court found that the combination of the length of the applicant's detention and the judge's delay in considering his case meant that a proper balance had not been struck between the need to enforce the order made against the applicant and the applicant's right to liberty. Accordingly, the Court held that there had been a violation of Article 5 § 1 (b).

Articles 10 and 14

This part of the application was rejected as manifestly ill-founded.

Article 41

The Court made no award under Article 41 as the applicant had not made a claim for just satisfaction. However, on revision, on 15 December 2005, the Court held that its finding of a violation constituted just satisfaction and awarded the applicant €1,700 for costs and expenses.

The applicant's compulsory residence on a small section of a remote Italian island constituted a deprivation of liberty and violated Article 5 § 1

33. JUDGMENT IN THE CASE OF GUZZARDI v. ITALY

(Application no. 7367/76)
6 November 1980

1. Principal facts

The applicant, Mr Michele Guzzardi, was an Italian national who was arrested on 8 February 1973, placed in detention on remand and then charged with conspiracy and being an accomplice to the abduction of a businessman. He was initially acquitted on 13 November 1976 by the Milan Regional Court for lack of sufficient evidence but was later convicted on 19 December 1979 by the Milan Court of Appeal. He was sentenced to eighteen years' imprisonment and a fine.

According to Article 272 of the Italian Criminal Code Procedure, the applicant's detention on remand could not exceed two years. Thus, on 8 February 1975 he was removed from Milan gaol and taken to the island of Asinara. This transfer followed a report on 23 December 1974 sent by the Milan Chief of Police to the Milan State prosecutor recommending that the applicant be subjected to the measure of "special supervision" provided for under Italian law. The report made reference to indications that the applicant did not work in the building trade as he claimed but was in fact involved in illegal activities and belonged to a band of Mafiosi. The report described the applicant as "one of the most dangerous individuals".

On 30 January 1975, the Milan Regional Court directed that the applicant be placed under special supervision for three years. As part of this special supervision, the applicant was obliged to reside "in the district (commune) of the island of Asinara". He also had to meet various conditions including: reporting to the supervisory authorities twice a day and whenever called upon to do so; not returning to his residence later than 10pm; not going out before 7am; and informing the supervisory authorities in advance of any long-distance phone call made or received and of the name and number of the person he wished to phone.

The whole island of Asinara covers an area of 50 sq. km but the area reserved for individuals in compulsory residence only covered 2.5 sq. km. Those in compulsory residence could apply for permission for a supervised visit to Sardinia or the

Italian mainland if they had good reasons. There was also the option to visit Porto Torres to buy provisions after authorisation and under supervision. However, the frequency and actual possibility of such visits were disputed.

The applicant appealed to the Milan Court of Appeal (First Chamber) arguing that the decision to place him under special supervision was invalid and unjustified. However, this appeal did not have a suspensive effect and the applicant was obliged to reside on Asinara for its duration. The appeal was dismissed on 12 March 1975. The Appeal Court found that Asinara was a suitable location for compulsory residence. It emphasised that the purpose of the measure was to separate the applicant from his social environment in order to make contacting his previous associates more difficult and that this requirement took precedence over other requirements such as the absence of regular employment or suitable accommodation for a family. The applicant appealed to the Court of Cassation on 3 April 1975, but it was dismissed as being devoid of foundation on 6 October 1975.

The Second Chamber of the Court of Appeal gave its decision on 20 January 1976. It affirmed that the demands of the protection of society justified the special form of isolation undergone by the extremely dangerous individuals who were sent to Asinara. However, it decided that these demands did not require that these individuals were separated from their families or deprived of regular employment. Following this decision, on 21 July 1976 the Milan Regional Court directed that the applicant be sent to the district of Force on the Italian mainland. The reasoning given was that his co-accused was also serving a compulsory residence measure on Asinara and the applicant's continued presence may have had negative repercussions on the security of the island and the ensuing criminal proceedings. The applicant then had to remain in Force until 8 February 1978, when the three-year period initially fixed by the Milan Regional Court for the special supervision expired.

2. Decision of the Court

The applicant complained that the actions of the Italian authorities in compelling him to reside in such a small area of land where he was unable to work, keep his family permanently with him, practise the Catholic religion or ensure his son's education constituted a violation of Articles 3, 8, 9 and Article 2 of Protocol 1. Additional observations were requested on Articles 5 and 6, provisions which the applicant later relied on in addition to his previous complaints. The complaint under Article 5 became the focus of the judgment.

Article 5

The Court began by reiterating the well-established principle that Article 5 is not concerned with mere restrictions on liberty of movement. These restrictions are governed by Article 2 of Protocol 4, which has not been ratified by Italy. In order to determine whether someone has been deprived of their liberty for the purpose of Article 5, a range of factors such as the type, duration, effects and manner of implementation of the measure in the individual's concrete situation need to be considered.

In the applicant's case, the Court accepted that "special supervision" under Italian law did not in itself fall within the scope of Article 5. However, it is possible that the manner of implementation of a measure can lead to the finding of a deprivation of liberty and in this case, it was only the manner of implementation of the special supervision which fell to be considered.

The Court placed more emphasis on the range of factors that were restricting the applicant's liberty and less on the fact that the area that the applicant was confined to exceeded the dimensions of a cell and contained no physical barriers to exit. Amongst other factors, the Court noted that the area of confinement was a tiny section of an island that was difficult to access and was predominantly taken up by a prison. It also commented on the lack of opportunities for social contact. It was held that while taken singly each of the factors mentioned would not amount to a deprivation of liberty, cumulatively and in combination they raised issues under Article 5. Consequently, the Court found there had been a deprivation of liberty.

Next, the Court considered whether the situation fell under one of the authorised deprivations of liberty set out in Article 5 § 1 (a)-(f). Firstly, the Court rejected the Government's argument that the applicant could be classed as a "vagrant" for the purposes of Article 5 § 1 (c). It held that during proceedings the Italian authorities did not depict the applicant as a vagrant but instead focused on his criminal record, his illegal activities and his links with the mafia. Moreover, the Court did not consider the applicant's way of life to be in line with the ordinary meaning of the word "vagrant". Importantly, it was emphasised that Article 5 §1 (c) permits the detention of persons of unsound mind, alcoholics, drug addicts and vagrants not only because they are occasionally deemed dangerous for public safety but also because their own interests may necessitate their detention. Consequently, the Court could not accept that the

fact that Article 5 § 1 (c) authorises the detention of vagrants, would mean that the aforementioned reasoning could be applied to any individual who was regarded as dangerous.

The Court then went on to consider the possibility of the applicant's detention being justified under the other paragraphs of Article 5 § 1 which were not pleaded by the Government. It ruled out detention "after conviction by a competent court" (Article 5 § 1 (a)) since the compulsory residence was not punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime. The Court also rejected the possibility of a justification under Article 5 § 1 (b) since a warning issued by Chief of Police did not constitute "an order of a court".

Furthermore, Article 5 § 1 (c) was not deemed to be applicable since the decisions of the Regional Court had no connection in law with the criminal investigation relating to abduction, the offence the applicant was reasonably suspected of having committed. The special supervision legislation could be applied irrespective of whether a charge had been brought against an individual. In addition, since Article 5 § 1 (c) and the ability to detain an individual where it is reasonably considered necessary to prevent them committing an offence does not authorise a policy of general prevention directed against a particular category of individuals such as the mafia, the applicant's detention could not be justified under this provision.

Therefore, the Court concluded that there was no justification under Article 5 § 1 (a)-(f) for the applicant's detention and there had been a breach of Article 5 § 1.

Articles 3, 6, 8 and 9

The Court dealt briefly with the applicant's remaining complaints. It held that his living conditions did not reach the adequate level of severity to fall within the scope of Article 3. The Court found that there was no evidence for an infringement of Article 6 § 1.

Since the applicant's wife and son were able to live with him for fourteen of the sixteen months he spent on the island and the reason they had to leave was because they had not applied for the renewal of their residence permits, the Court found there to be no conduct that could be attributed to the Italian state

in violation of Article 8. Finally, the Court found no evidence to substantiate the applicant's claim that his right to manifest his religion had been infringed upon.

Article 50 (now Article 41)

The Court awarded the applicant under Article 50 a sum of one million Lire.[756]

[756] Equivalent to £557.23 at the time.

Strict implementation of counter-terrorism resolutions adopted by the United Nations Security Council violated Article 8 but did not deprive the applicant of his liberty within the meaning of Article 5

34. GRAND CHAMBER JUDGMENT IN THE CASE OF NADA v. SWITZERLAND

(Application no. 10593/08)
12 September 2012

1. Principal facts

The applicant was an Italian and Egyptian national born in 1931. He lived in Campiona d'Italia, an Italian enclave of about 1.6 square kilometres that was surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano. He was therefore unable to travel to the rest of Italy without entering Switzerland. The applicant suffered from a number of medical conditions, and was unable to undergo an operation scheduled in 2004 due to a travel ban, which was the subject of this application.

In response to attacks by Osama bin Laden and his network, the United Nations (UN) Security Council adopted Resolution 1267 on 15 October 1999 which imposed sanctions on the Taliban and created the UN Sanctions Committee. On 2 October 2000, the Swiss Federal Council adopted the Taliban Ordinance which instituted measures against the Taliban. The Security Council extended the sanctions regime in 2000 by Resolution 1333, requesting the UN Sanctions Committee to keep a list of persons and organisations connected to Osama bin Laden and al-Qaeda. The Taliban Ordinance was amended accordingly.

The Swiss Federal Prosecutor opened an investigation into the applicant's activities on 24 October 2001. His name and a number of organisations associated with him were added to the sanctions list and the list annexed to the Taliban Ordinance in November 2001. In January 2002, the Security Council's Resolution 1390 introduced an entry-and-transit ban for all individuals, groups, undertakings, and associated entities on the sanctions list. The Swiss Government amended the Taliban Ordinance accordingly and applied the entry-and-transit ban to individuals named in its Annex, including the applicant.

When the applicant visited London in November 2002, his money was seized and he was arrested and deported back to Italy. Then, in October 2003, the Canton of Ticino revoked his special border-crossing permit. In November 2003, the Swiss Federal Office of Immigration, Integration and Emigration ("IMES") informed him that he was no longer authorised to cross the border. In March 2004, the IMES dismissed his request for leave to enter or transit through Switzerland for medical treatment there, and for legal proceedings in both Switzerland and Italy, as ill-founded. Later, the Federal Office for Migration (the successor to the IMES) granted the applicant an exemption for one day to attend legal proceedings in Milan, which he did not use.

In May 2005, the Federal Prosecutor found that the accusations against the applicant were unsubstantiated and closed the investigation. The applicant's request to the Federal Council to remove his name and organisations associated with him from the Annex to the Taliban Ordinance was rejected on the grounds that it could not do so while his name remained on the Sanctions Committee's list. The refusal indicated that he should request his State of citizenship or residence to apply for his removal from this list. His appeal reached the Federal Court which dismissed it on the grounds that under Article 25 of the United Nations Charter, Switzerland had undertaken to accept and carry out decisions of the Security Council. However, in a meeting between his lawyer and a representative of the Federal Department of Foreign Affairs in February 2008, the latter indicated that the Swiss Government would support him in an application to the Sanctions Committee for delisting by confirming that the criminal proceedings against him had been discontinued.

In July 2008, the Sanctions Committee denied the Italian Government's request to remove the applicant's name. In August 2009, the applicant submitted a request in accordance with the Security Council's Resolution 1730 to delete his name from the Sanction Committee's list. His name was deleted from this list on 23 September 2009 and from the Annex to the Taliban Ordinance on 29 September 2009.

2. Decision of the Court

The applicant complained that the entry-and-transit ban imposed on him by Switzerland violated his right to respect for private, professional, and family life under Article 8 of the Convention. He also complained that it deprived him of his liberty within the meaning of Article 5 § 1. He further alleged that he suffered

treatment in breach of Article 3 and that his inability to leave the enclave to go to a mosque violated Article 9.

Preliminary objections

Given that the ban was imposed by an Ordinance of the Swiss Federal Council and the applicant's requests for exemption were rejected by Swiss authorities, the measures complained of were taken by Switzerland in the exercise of its jurisdiction within the meaning of Article 1.

Although the applicant was no longer restricted from crossing the Swiss border, he was still entitled to claim that he was a victim during the period in which he was subject to those restrictions. Lifting the sanctions could not be considered an implicit acknowledgment by the Government of a violation.

Article 8

A State is entitled to control the entry of non-nationals into its territory, and the Convention does not guarantee the right of an alien to enter another country. However, the Court endorsed the Federal Court's opinion that the measure at issue significantly restricted the applicant's freedom on account of the specific location of his residence in the Campione d'Italia enclave which was surrounded by Swiss territory. For a period of at least six years, it became more difficult for him to exercise his right to maintain contact with others who lived outside the enclave. Therefore, there had been an interference with his right to respect for his private and family life.

The applicant did not appear to dispute that the ban was imposed in pursuit of a legitimate aim. Nevertheless, the Court held that the ban pursued legitimate aims which included the prevention of crime, national security, and public safety, as it had been introduced in accordance with Security Council resolutions adopted to combat international terrorism under Chapter VII of the UN Charter. However, the States were free to choose the model by which they would implement Chapter VII resolutions.

The Court went on to consider whether the measures were proportionate to this aim. It was accepted that the threat of terrorism was serious at the time the measures were adopted. However, the investigations conducted by the Swiss and Italian authorities concluded that suspicions relating to the applicant's activities

were unfounded. The Court was surprised that it had taken the Swiss authorities until September 2009 to inform the Sanctions Committee that the investigation against the applicant had closed in May 2005. Had the authorities been more prompt in their communication, his name might have been deleted from the sanctions list, and in turn the Taliban Ordinance, much earlier.

There was also a medical aspect to the case. Despite the fact that the applicant was born in 1931 and had various health problems, his requests for an exemption from the entry-and-transit ban for medical reasons or in connection with judicial proceedings were denied. In the cases where his requests were accepted, it was understandable that he waived the right to these exemptions as insufficient in duration given his age and the distance to be covered. While Switzerland was not responsible for placing the applicant's name on the list and was not competent to apply to the Sanctions Committee for his delisting, it appeared that the Swiss authorities never sought to encourage Italy to make such an application or offer its assistance for this purpose. Therefore, the Court held that it had not taken sufficient account of the particular nature of the applicant's case, namely the specific location of his residence, his age and health, and the considerable duration of the measures.

The State had not persuaded the Court that it had taken all possible measures within its latitude to adapt the sanctions regime to the applicant's situation, as opposed to solely relying on the binding nature of Security Council resolutions. Therefore, it was not necessary for the Court to determine the hierarchy between obligations under the Convention and the UN Charter. Ultimately, the measures failed to strike a fair balance between the legitimate aims pursued and the applicant's right to respect for his private and family life. Accordingly, the Court held there was a violation of Article 8.

Article 13

Although the applicant was able to apply to the Swiss authorities to delete his name from the list, the Federal Court considered that only the UN Sanctions Committee was competent to grant this request. As such, the applicant did not have an effective remedy for the violation of his rights. Therefore, there was a violation of Article 13.

Article 5

The restrictions on the applicant lasted for a considerable length of time. However, he was not prevented from moving freely within the enclave which, the Court notes, he had chosen as his permanent residence of his own free will. Further, he was not subject to detention, house arrest, nor was he under surveillance by the Swiss authorities, prevented from receiving visitors, or required to report regularly to the police. He was only prohibited from entering or transiting through Switzerland. Finally, the sanctions regime had allowed him to seek exemptions from the ban which, when granted, he did not use. In conclusion, the measure had not deprived the applicant of his liberty within the meaning of Article 5 § 1. This part of the application was therefore dismissed as manifestly ill-founded.

Article 3 and 9

The Court rejected this part of the application as inadmissible as there was no appearance of any violations of Articles 3 and 9.

Article 41

The Court awarded the applicant €30,000 for costs and expenses.

The lockdown imposed by the Romanian authorities during the Covid-19 pandemic could not be equated with house arrest and Article 5 § 1 was not applicable

35. DECISION IN THE CASE OF TERHEŞ v. ROMANIA

(Application no. 49933/20)
13 April 2021

1. Principal Facts

The applicant, Mr Cristian-Vasile Terheş, was a Romanian national born in 1978.

On 11 March 2020, the World Health Organization declared that the world was facing a pandemic caused by Covid-19. Five days later, the Romanian President enacted a decree introducing an immediate thirty-day state of emergency in Romania and imposed restrictions on freedom of movement. The Romanian President extended the state of emergency for thirty days on 14 April 2020, terminating on 14 May 2020 at midnight.

In response to the developing situation, on 24 March 2020, the Minister of the Interior issued an ordinance advising people against leaving home between 6 a.m. and 10 p.m. and prohibiting them from doing so between 10 p.m. and 6 a.m. The Minister then issued a second ordinance which prohibited all movement outside the home, except in a certain number of exhaustive circumstances. Any person leaving home had to carry a document attesting to valid reasons for doing so and breaches of the rules were punishable by a fine.

One day following the President's announcement of a state of emergency, the Permanent Representation of Romania to the Council of Europe informed the Secretary General of the Council of their intention to derogate under Article 15 of the Convention. The Council of Europe received regular updates on the measures Romania were taking which required them to continue their derogation from obligations under Article 4 of Protocol 2. The derogation lasted until 14 May 2020, when the state of emergency was terminated.

On 7 May 2020, the applicant instigated proceedings before the Bucharest County Court under Article 5 § 4 of the Convention. The applicant alleged that he was the subject of "administrative detention" from 24 March to 14 May 2020,

caused by the Covid-19 measures enacted by authorities. He sought an order for his immediate release and a declaration that he had the right to leave his home for any reason without having to present any supporting document and risking a fine. The applicant asked the County Court to find his action devoid of purpose, owing to the cessation of the lockdown measure, on 12 June 2020.

In addition, the applicant lodged appeals for reconsideration of the decrees and the second ordinance on 8 and 25 May 2020. He justified his request on the basis that the measures personally affected his right to liberty and security. The appeals were dismissed on the ground that the texts in question could not be subject to administrative review.

2. Decision of the Court

The applicant complained under Article 5 § 1 of the Convention that the general lockdown imposed from 24 March to 14 May 2020 constituted an unlawful deprivation of liberty.

Article 5 § 1

As a preliminary point, the Court noted that the applicant did not invoke before the Court Article 2 of Protocol No. 4 of the Convention, the right to freedom of movement. He hence sought to demonstrate that the general lockdown imposed constituted a deprivation of liberty, rather than simply a restriction of his freedom of movement.

The Court affirmed that in order to determine whether the measure amounted to a deprivation of liberty, the applicant's situation had to be examined in light of the criteria established by its case-law. The Court looked at the particulars of the measure – namely its length, type, effects and methods of execution – in light of the context in which it took place.

In terms of context, the Court observed that the measure was imposed in a state of emergency introduced for health reasons, with the aim of preventing the community transmission of infection by isolating and confining the entire population. In agreement with the authorities, the Court was of the opinion that the situation could be described as an "unforeseeable exceptional context". The implementing legislation specified that if the Romanian authorities failed to act urgently to limit the spread of the virus, this would have a serious impact on the

right to life as well as the right to health. Given this context, the Court concluded that the measures were imposed with the aim of mitigating the economic and social impact of the pandemic and protecting the right to life.

In terms of particulars, the Court noted that the measure in question lasted fifty-two days, namely from 24 March to 14 May 2020. As to the type and method of execution, the applicant was not the subject of an individual measure. Rather, it was a general one imposed on the whole population through legislation enacted by Romanian authorities. As to effects, the applicant had been obliged to stay at home as a result of the measure. However, he was allowed to leave for one of the reasons expressly provided for in the implementing legislation, with the relevant exemption form. Further, he was not subject to individual surveillance by the authorities, nor was he forced to live in a confined space or deprived of social contact. Accordingly, the Court found that the contested measure could not be equated to house arrest.

The Court noted in particular that the applicant had not explained how the measure had affected him personally or identified any particular aggravating circumstances. For example, the applicant did not allege that his situation did not qualify under any of the exceptions provided by the ordinance which would allow him to leave his home and was thus obliged to remain at home throughout the emergency. Rather, the Court noted that he had provided no description of how he had personally experienced the lockdown in specific terms.

In view of all these considerations, the Court concluded that the degree of restrictions imposed on the applicant's freedom by the lockdown measure was not of such intensity as to constitute a deprivation of liberty. Accordingly, Article 5 § 1 was not applicable in the present case.

Finally, the Court noted that Romania had derogated following the process in Article 15 of the Convention and intended to apply the derogation to their obligations arising from Article 2 of Protocol No. 4 to the Convention, which guarantees freedom of movement. The Court held that given Article 5 § 1 was not applicable in the present case, it was not necessary to examine the validity of the derogation lodged by Romania with the Council of Europe.

Accordingly, the Court rejected the application as inadmissible as there was no appearance of any violation of Article 5.

V. Judicial proceedings and guarantees

The failure to provide independent expert evidence and a timely response to criminal allegations of medical malpractice with proceedings lasting over fifteen years constituted a violation of Article 2

36. JUDGMENT IN THE CASE OF BAJIĆ v. CROATIA

(Application no. 41108/10)
13 November 2012

1. Principal facts

The applicant was a Dutch national born in 1950. In August 1994, his sister was admitted to the Rebro hospital in Zagreb for an abdominal tumour under the treatment of a surgeon and professor at the University of Zagreb Medical Faculty ("the Faculty"), whom the applicant paid 5,000 German marks for the required surgery. His sister died two days afterwards, the surgeon establishing a pulmonary embolism as the cause.

In October 1994, the applicant and two other relatives lodged a criminal complaint against the surgeon with the Zagreb Municipal State Attorney's Office, accusing him of bribery and medical malpractice. A medical report from two professors at the Faculty found no medical malpractice and these charges were therefore rejected. The applicant requested that the Zagreb Municipal Criminal Court commission a new report from experts not affiliated with the accused. Accordingly, a new report was commissioned from a doctor at Rijeka University Medical Faculty, which also found no medical malpractice. Despite the doctor's admission he was not a permanently appointed medical expert, the court acquitted the accused of the medical malpractice charges. Proceedings related to the bribery charge were discontinued in 2000 on the grounds that they had become time barred.

In September 2004, the applicant appealed to the Zagreb County Court, which ordered a re-trial and commissioned a new report, as the doctor from Rijeka University was not a sworn medical expert. This new report again found no medical malpractice and was prepared by professors from the Faculty. The applicant made three further requests for a new report, the last two specified it be from an institution outside of Croatia, pointing out that one of the experts was a Head of Department at Rebro Hospital. The requests were all denied and, in December

2007, the Zagreb Municipal Criminal Court acquitted the accused. The applicant made further appeals, which reached the Constitutional Court in November 2009, and were declared inadmissible on the grounds that the proceedings in issue had not concerned any of his civil rights, obligations or any criminal charge against him.

In May 1995, the applicant brought a complaint to the Ministry of Health. Disciplinary proceedings were opened on charges of bribery. The accused was initially found guilty and dismissed from Rebro hospital, but this was overturned in August 1995 and instead, he was suspended from work for one year. In March 2001, the applicant brought a civil action in the Zagreb Municipal Civil Court against the accused, which was still pending at the Constitutional Court at the time of the present judgment.

2. Decision of the Court

The applicant complained that all the relevant facts concerning his sister's death had not been properly established in the unreasonably long criminal proceedings, which the Court considered under Article 2. He further complained as to lack of effective domestic remedy and lack of fairness in the criminal proceedings, under Article 13 and Article 6 respectively.

Article 2

The Court reiterated that the acts and omissions of authorities in the field of health care may in certain circumstances engage their responsibility under the positive limb of Article 2. However, this does not apply in cases of judgment error or negligent co-ordination, where a State has made adequate provision for securing high professional standards among health professionals and the protection of the lives of patients.

It further reiterated that Article 2 creates a positive obligation on States to set up an independent judicial system to determine the cause of death of patients in medical care, whether public or private, and to ensure those responsible are held accountable. Independence was defined as: the lack of hierarchical or institutional connection between those conducting assessments as part of the proceedings and those implicated in the events, as well as the formal and de facto independence of the former. It was emphasised this was particularly important when obtaining medical reports from expert witnesses, as they carry crucial weight in medical negligence cases.

The Zagreb Municipal Criminal Court commissioned three medical reports. It was not disputed that all the medical experts on whose reports the domestic authorities based their decisions were professors at the Faculty. The accused was also a professor at the Faculty and a well-known medical expert from Zagreb. Furthermore, one of the experts was Head of Pathology at Rebro Hospital, despite Article 250 of the Croatian Code of Criminal Procedure expressly stating that an expert who is employed by the same State authority or employer as the accused or injured has to be disqualified.

It was also noted that the applicant requested, on numerous occasions, that the medical experts from the Faculty be disqualified from the case. However, the domestic courts, without directly asking the expert witnesses as to their connection with the accused, dismissed the applicant's motions to disqualify them, saying there was nothing to suggest bias.

The Court stressed that what was at stake was the trust of the public in the criminal justice system: the fact the medical experts could not be seen as objectively impartial according to Croatian law, given they were professors from the same Faculty as the accused.

It reiterated that Article 2 guarantees prompt and reasonable responses, defined as 'without unnecessary delay', by the government in investigating patient death. It noted that the criminal proceedings lasted over fifteen years, which was excessively long, and neither the conduct of the applicant, nor the complexity of the case sufficed to explain such length. Moreover, with regards to the complaint brought to the Ministry of Health, the Court noted it only opened proceedings against the bribery allegations, without giving any answer as to the complaint of medical malpractice.

Therefore, the Court found that the domestic system as a whole failed to provide an adequate and timely response to the applicant's allegations, violating Article 2.

Article 13

The Court noted that effectiveness of remedies had been sufficiently addressed under Article 2, so there was no need to consider it further under Article 13.

Article 6

In light of the evidence available, the Court considered there was no appearance of a violation and therefore concluded this complaint inadmissible as it was manifestly ill-founded.

Article 41

The Court awarded €10,000 to the applicant in respect of non-pecuniary damages, and €7,900 for costs and expenses.

The performance of a medically necessary operation on a detainee without his consent did not violate Articles 3 and 8 but the failure to provide him with genuine legal assistance to prepare for his criminal trial violated Article 6

37. JUDGMENT IN THE CASE OF BOGUMIL v. PORTUGAL

(Application no. 35228/03)
7 October 2008

1. Principal facts

The applicant was a Polish national who was born in 1971. At the time he lodged his application to the Court he was detained in Lisbon Prison.

In November 2002, on arrival at Lisbon airport from Brazil, the applicant was searched by customs officers, who found several packets of cocaine hidden in his shoes. He informed them that he had swallowed a further packet, which was in his stomach. An x-ray revealed the existence of the sachet in his digestive tract. The applicant underwent an upper digestive endoscopy to identify the exact location of the packet, which was then surgically removed from his stomach. According to the doctors' reports, the surgical intervention was urgently required to prevent the applicant from digesting the contents of the packet. The applicant's medical record contained his written consent to the upper digestive endoscopy but there was no record of his consent to the surgery to remove the cocaine packet from his stomach. The applicant and the Government disagreed as to whether he orally consented or not to be submitted to examination and medical treatment.

Charges were brought against the applicant for drug trafficking, and he was placed in pre-trial detention. During the initial phase of the proceedings, the applicant was assisted by a trainee lawyer. In January 2003, in view of the severity of the applicant's potential sentence, a new, more experienced lawyer was assigned to his case. However, this lawyer took no action on the case other than to request his discharge from proceedings three days before the trial. A replacement lawyer was assigned on the day the trial began and had only five hours to study the case file. In September 2003 the Lisbon Criminal Court convicted the applicant, sentenced him to four years and ten months' imprisonment and ordered his exclusion from Portugal. The applicant appealed against the judgment without legal help, arguing that the sentence was excessive and that he had received inadequate legal support. His appeal was dismissed in November 2003.

By a letter of 6 June 2005, he informed the Court that he had been transferred to a prison in Poland. He was released on 5 December 2005. On 13 November 2006, Dr. Viegas, who was head surgeon at the hospital at the time of the applicant's surgery, made a declaration stating that the operation on the applicant had been necessary, that the applicant had given oral consent to the surgery and that the operation had been explained in the same language as the explanation for the upper digestive endoscopy, which the applicant had understood.

2. Decision of the Court

The applicant alleged that he had not received genuine legal assistance during the criminal proceedings against him contrary to Article 6 §§ (1) and (3)(c) of the Convention. He also complained that the surgery performed on him constituted a serious interference with his physical integrity. The Court dealt with this complaint under Articles 3 and 8.

Article 6

The Court reiterated that a State could not be held responsible for every shortcoming on the part of a lawyer appointed for legal-aid purposes. Article 6 § 3 (c) only required the State to intervene where the accused's lawyer was manifestly incompetent or if deficient legal assistance was sufficiently brought to their attention in some other way. The present case involved a serious offence which attracted a potentially severe sentence. Five hours preparation on the day of the hearing was found to be clearly insufficient for the lawyer to prepare the applicant's defence.

The judicial authorities failed to respond to this deficiency despite the applicant having brought it to their attention. The Court therefore found that the Lisbon Criminal Court was aware that the applicant received manifestly deficient legal assistance and that it should have adjourned the proceedings of its own initiative to ensure that the applicant received adequate legal assistance. Accordingly, the Court held that there had been a violation of Article 6 § 1 taken together with Article 6 § 3 (c) .

Article 3

The Court stated that there is an obligation under Article 3 to protect the physical integrity of persons deprived of their liberty, particularly in cases where

a detainee is subjected to involuntary medical treatment. However, a medical procedure deemed necessary by established medical opinion did not, in principle, amount to inhuman or degrading treatment.

The Court first considered whether the applicant had consented to the treatment, in which case there would be no issue under Article 3. The fact that Dr. Viegas' declaration that the applicant had consented to the operation was given four years after the fact diminished its probative value. While Dr. Viegas stated that the applicant "surely understood" the procedure as the same language had been used to communicate the endoscopy, no further details were provided as to the language used to communicate with the applicant. Finally, it was difficult to understand why he had not been required to provide written consent for the operation when he had been required to provide it for the upper digestive endoscopy, which was a less intrusive procedure. As such, the Court considered that it had not been proved beyond reasonable doubt that the applicant had given his consent to the treatment. Nor had it been established that he had refused and been forced to undergo the operation.

However, it had been established that the operation had been required for therapeutic reasons and had not been carried out for the purpose of collecting evidence, as the applicant risked dying from intoxication. It was a straightforward operation and the applicant had received constant supervision and an adequate medical follow-up. Having regard to the evidence in the case file, the Court considered that it had not been established that the ailments from which the applicant allegedly suffered were related to the operation. Consequently, the operation had not been such as to constitute inhuman or degrading treatment. Therefore, there had been no violation of Article 3.

Article 8

The Court reaffirmed that the protection of the right to private life included protection of a person's physical and moral integrity and that any interference with bodily integrity, including a minor medical procedure, constituted an interference with the right to respect for private life.

The Court accepted that the State's decision to operate on the applicant was prescribed by domestic law and that the legitimate aim of the operation was to protect the health of the applicant. For the reasons provided under Article 3, the Court considered that a fair balance had been struck between the public interest

to protect the applicant's health and his right to protection against physical or psychological duress. Therefore, there had been no violation of Article 8.

Article 41

The Court awarded the applicant €3,000 in respect of non-pecuniary damage.

Ukrainian authorities were not responsible for an appeal remaining unexamined due to the inability to retrieve the criminal case file from area beyond their control – no violation of Article 6

38. JUDGMENT IN THE CASE OF KHLEBIK v. UKRAINE

(Application no. 2945/16)
25 July 2017

1. Principal facts

The applicant was a Ukrainian national living in the Chernihiv region of Ukraine.

In April 2013, he was convicted by a court in the Luhansk region of offences including banditry and armed robbery, and was sentenced to eight years and nine months imprisonment. His appeal against his conviction was still pending when hostilities in eastern Ukraine began in April 2014. He awaited examination of his appeal in Starobilsk remand prison, located in the part of the Luhansk region controlled by the Ukrainian Government. However, his case file remained with the Court of Appeal, in Luhansk, which was not under Government control.

When the Court of Appeal was relocated to Sieverodonetsk, in the Government-controlled area, the applicant complained about the delay in the examination of his appeal. He was told that the appeal court could not examine his case as his file was blocked in Luhansk. The applicant asked the Parliamentary Commissioner of Human Rights for assistance, but was told it was impossible to obtain case files from territory not controlled by the Government. His application to have the case file restored, lodged with a local court, was equally unsuccessful as the court concluded that no sufficient material concerning his case was available in Government-controlled territory. He also applied for release on several occasions between May 2015 and February 2016, without success. He was released in March 2016 as he benefitted from a legislative reform which had in the meantime been adopted permitting release of individuals who have served at least half of their sentence while in detention on remand. At the time of the present judgment, the appeal against his conviction was still pending before the Court of Appeal.

Meanwhile, on 21 May 2015 the Parliament of Ukraine declared a public emergency citing the Russian Federation's ongoing armed aggression against Ukraine, derogating from Article 15 of the Convention.

2. Decision of the Court

The applicant complained the authorities' failure to adopt rules and procedures which would allow for his appeal to be effectively examined constituted a violation of Article 6 and Article 2 of Protocol No.7. He further complained, under Article 5 § 1, of his detention from 31 April 2013 to 18 March 2016 and that he had no enforceable right to compensation, under Article 5 § 5, in that respect.

Article 6

The Court noted at the outset that its scope was limited by the fact the application was directed against Ukraine only and the applicant did not allege that his rights had been breached due to a deficiency in international co-operation between Ukraine and any other High Contracting Party. It reiterated that Article 6 guarantees both the right of access to a court, and the right to a fair hearing within a reasonable time. It considered that the extent to which those rights were respected in this case were closely interrelated, so were examined together.

It was undisputed that the applicant was able to lodge an appeal against his conviction and that this appeal was accepted for examination on the merits. It was also uncontested that the key reason why the applicant's case had not, at the time of judgment, been examined by the Court of Appeal was because his case file was no longer available as a result of hostilities in areas the Government did not control.

Regarding the question of whether the Ukrainian authorities had taken all the measures available to them in practice, under the circumstances, to render effective the applicant's rights guaranteed by Article 6, the Court addressed three main possible avenues which, according to the applicant, were open to the authorities to proceed with the examination of his appeal.

As to the possibility of requesting the assistance of the Parliamentary Commissioner for Human Rights in obtaining the case file, the Court noted in particular that the applicant had asked for such help, which the Commissioner had been unable to provide. It was also taken into account that hostilities in the area had been continuing throughout the period at issue and no lasting ceasefire had been established by the time of judgment.

As to the possibility of conducting a new investigation and trial, the Court could see no reason to doubt the domestic court's conclusion, reached in the case

file restoration proceedings, that no relevant material concerning the case was available to it, given that both the offence which the applicant had been convicted of and his trial had taken place in the areas of the Luhansk Region currently not under the Government's control. It had therefore not been shown that a new investigation and trial would be effective in practice.

As to the option of reviewing the applicant's conviction and sentence based on the available material, the Court noted that under the legislation in force, the standard of review would entail an examination of questions of both law and fact, thus requiring access to the evidence collected in the case file. Given that no such evidence was available to the authorities at the time, and that it could not be ruled out that they might come into possession of such evidence in the future, an examination of the entirety of the issues before the evidence was available might prejudice the possibility of a more informed review in the future.

Having regard to the fact that, the question of whether the applicant was in detention was a relevant factor in determining the reasonableness of the length of criminal cases, the Court attached importance to the fact that the Ukrainian courts had adopted the decision to release him.

The Court concluded that the Ukrainian authorities had done all in their power under the circumstances to address the applicant's situation. It also welcomed other actions the authorities had taken, in particular their requests for assistance of the International Committee of the Red Cross in facilitating the recovery of files located in the territory not under their control and a legislative proposal intended to facilitate examination of appeals in situations where part of a case file remained unavailable. Hence, the Court concluded there had been no violation of Article 6.

Finally, the Court noted that the parties did not request it to apply Article 15 of the Convention in the applicant's case. Accordingly, and in view of its conclusion under Article 6, it was not necessary to assess whether the situation complained of was covered by a valid derogation made by Ukraine under Article 15 of the Convention.

Article 2 of Protocol No.7

The Court considered it unnecessary to examine this complaint separately under Article 2 of Protocol 7, as it concerned the same facts and issues as those under Article 6.

Article 5

The Court noted that, as the applicant was detained following conviction by a competent court, his detention was in accordance with domestic law and its length did not exceed his sentence. There was no other indication that his detention was not in conformity with Article 5. Therefore, the Court declared this complaint inadmissible as manifestly ill-founded.

Though domestic courts established responsibility and awarded compensation for the applicant's endangered health after drinking tap water, the sum awarded was insufficient in violation of Article 8

39. JUDGMENT IN THE CASE OF OTGON v. REPUBLIC OF MOLDOVA

(Application no. 22743/07)
25 October 2016

1. Principal facts

The applicant was a Moldovan national who lived in Călărași, Republic of Moldova. In October 2005, both her and her 12-year-old daughter were admitted to hospital with acute dysentery after drinking tap water from their apartment.

She was discharged two weeks later and soon after filed a lawsuit against the State-owned local utilities provider, claiming the equivalent of €6,700 in compensation for harm caused to her health.

In March 2006, Călărași District Court ruled in her favour, since various technical and sanitary reports revealed that sewage water had infiltrated the drinking water pipe in the vicinity of her apartment. She was awarded the equivalent of €648, the court basing its decision on the amount of physical and mental suffering caused. Relying on the same elements (degree of harm), the higher courts then confirmed the findings of the first-instance court, but reduced the award to the equivalent of €310.

2. Decision of the Court

The applicant complained, under Article 8, that the amount of compensation awarded was insufficient considering the extent to which her health was endangered.

Article 8

The Court recalled that it falls first to national authorities to redress any alleged Convention violation. A decision of the domestic authorities favourable to the applicant is not in principle sufficient to deprive her of her "victim" status

under the Convention, unless the authorities have redressed the breach and awarded sufficient compensation. With regards to the latter, where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34.

In relation to the present case, it was noted that the violation of the applicant's rights under Article 8 by the State-owned company was not a matter of dispute between the parties, as confirmed by the domestic courts' findings establishing responsibility and awarding compensation. What was at issue was the amount of compensation awarded.

While the first-instance court had awarded the applicant the equivalent of €648, the higher court had halved that amount and the Supreme Court upheld that decision. No specific reasons had been given for that reduction. Indeed, the higher courts had arrived at a different conclusion concerning the amount of compensation to be awarded even though they had relied on the same element, the degree of harm.

Moreover, the applicant had sustained a certain degree of mental and physical suffering as she had been kept in hospital for two weeks. Lastly, the sum awarded by the domestic courts was considerably below the minimum awarded by the Court in similar cases. Therefore, the Court held that there had been a violation of Article 8.

Article 41

The Court held the Republic of Moldova was to pay the applicant €4,000 in respect of non-pecuniary damage.

Unreasonable delays in foster care proceedings violated the first applicant's right to a fair trial under Article 6 § 1 and such delays could not be justified by Covid-19 related measures, there was, however, no violation of Article 8

40. JUDGMENT IN THE CASE OF Q and R v. SLOVENIA

(Application no. 19938/20)
8 February 2022

1. Principal facts

The applicants Q and R were Slovenian nationals and the grandparents of W and Z, who were born in 2010 and 2012 respectively. In December 2015, the applicants' daughter, the mother of W and Z, was killed and her husband, the father of W and Z, was arrested for the murder.

W and Z initially stayed with the applicants. The first applicant submitted a petition with the S.G. Social Work Centre ("S.G. Centre") to foster her grandchildren. On 17 February 2016, the S.G. Centre found the applicant not to be the most suitable candidate for fostering W and Z. This resulted in the V. Social Work Centre ("V. Centre") removing the children on 30 March 2016 and placing them with a foster family in another region without the knowledge of the applicants.

The first applicant pursued domestic proceedings against the removal of her grandchildren, challenging the decision in the Administrative Court on 22 April 2016. On 2 November 2016, she requested that the grandchildren participate in the proceedings. The grandchildren were initially represented by A.G., who was acting as their guardian, but who was removed from the position at her request and replaced by the V. Centre. The Administrative Court held its first hearing on 8 March 2017. An expert appointed by the court submitted a report on whether it would be in the children's best interest to stay with the applicant on 3 October 2017 and 19 November 2017, finding that the applicant was not equipped to take care of her grandchildren long-term as both children required special care resulting from cognitive and/or behavioural issues. Though he wrote two expert reports, the court refused to hear his opinion on contact proceedings due to his limited field of expertise.

The Administrative Court held its second hearing on 10 January 2018, rejecting the applicant's claims. The applicant lodged a complaint with the Constitutional Court on 27 July 2018, which issued a decision on 12 September 2019 quashing the Administrative Court's judgment and remitting the case. The Constitutional Court argued that, because the V. Centre had exercised public powers in removing the grandchildren from the applicant's care and previously provided an opinion that the applicant was not a suitable caretaker, the Administrative Court needed to appoint an independent and impartial guardian for the grandchildren.

The Administrative Court appointed a special guardian of the grandchildren's interests on 20 November 2019 and a committee to provide an expert opinion on 20 May 2020. Due to the complexity of the applicant's situation and the Covid-19 pandemic, the experts submitted their report on 2 February 2021. The report noted that the applicant was not able to provide for her grandchildren's long-term stable upbringing. Further, the experts noted that it was in the children's best interest, both reflecting the children's desires and mental well-being, to remain with their foster family. The report recommended that the applicant be given contact with the grandchildren for gradually longer periods of time and that potential reintegration of the grandchildren be considered when they were older.

In the time that the applicant's case was remitted to the Administrative Court, she filed numerous supervisory appeals and acceleratory remedies, all of which were rejected. The applicant lodged a second constitutional complaint on the basis that both the experts and judges of the Administrative Court lacked impartiality. That complaint, which was lodged after 1 September 2021, was still pending before the Constitutional Court at the time of the European Court's judgment. In addition, the proceedings before the Administrative Court were still pending at the time of the Court's judgment due to the court appointing a new panel of experts to the case.

In Slovenia, there were two separate instances when a pandemic was declared in the country. During the first pandemic, from 16 March to 5 May 2020, the courts only processed urgent cases. During the second pandemic, from 16 November 2020 to 31 January 2021, the courts processed all cases but did not hold hearings in non-urgent cases unless the hearings were by video link.

2. Decision of the Court

The first applicant complained that the foster care proceedings violated her rights under Article 6 §1 of the Convention as the proceedings were unreasonably long and unfair. The applicants also complained that the refusal of the domestic courts to examine one of the experts and the failure to appoint a special guardian to represent the grandchildren's interests violated the applicants' rights under Article 8.

Article 6

In regards to the admissibility of the applicants' Article 6 claim, the Court addressed that a person cannot complain of a violation of their Convention rights in proceedings to which they were not a party. As such, only the first applicant could claim a violation of Article 6 § 1, as the second applicant was not party to the foster care proceedings, and his complaint was declared inadmissible.

At the time of the Court's judgment, the proceedings had lasted over six years. In determining the reasonableness of the length of proceedings, the Court took into consideration the complexity of the case, the conduct of applicant and authorities, and what was at stake for the applicant.

Regarding the complexity of the case, the Court noted that the mere fact that domestic courts resorted to expert opinions could not alone explain nor justify the extreme length of the proceedings. In relation to the applicant's conduct, the Court noted that, though she made several requests for the removal of experts, the Government did not show how those requests lengthened the proceedings, especially because the requests were made while the Administrative Court was waiting for the preparation of the expert reports. As such, the Court held that the applicant did not delay the proceedings to any significant degree.

Regarding the conduct of the authorities, the Court noted that the three main reasons behind the length of the proceedings were the preparation of the expert reports, the remittal of the case, and delays caused by the Covid-19 pandemic. Both the failure of the expert panel to prepare the report and the failure of the Administrative Court to appoint a special guardian at first instance fell under the obligation for States to ensure that their courts can guarantee to everyone a final decision on disputes concerning civil rights and obligations within a reasonable time frame.

The Court noted that the restrictions necessitated by the Covid-19 crisis could understandably have had an adverse effect on the processing of cases before the domestic courts. However, it was not convinced that in the present case this could have absolved the authorities from its responsibility for the lengthy proceedings. In particular, it appeared that the case would have been dealt with during the periods of Covid-19 related restrictions had it been classified as urgent. The Government had argued that it had not considered the case urgent because it had not concerned a placement of children in foster care or carrying out of such care. The Court could accept the argument that the case did not involve the same urgency as one relating to placement in care, since regular contact was maintained between the first applicant and her grandchildren. Nonetheless, it considered that, in view of the limited nature of that contact, the importance of what was at stake for the first applicant, namely her wish to look after her grandchildren following her daughter's death, called for special diligence on the part of the authorities, especially taking into account the first applicant's argument concerning the effect of the passage of time on her relationship with W and Z.

Accordingly, the Court found that the foster care proceedings were not heard within a reasonable time and violated the first applicant's right to a fair trial under Article 6 § 1 of the Convention.

Article 8

The Court mentioned that the concept of "family life" under Article 8, includes at least the ties between near relatives, such as grandparents and grandchildren, and "respect" implies that the State will act in a manner which permits those ties to develop normally. Further, in determining whether restrictions of contact with a child might be "necessary in a democratic society", the child's interest must come before all other considerations. Due regard must be had to the direct contact national authorities have with the child, and it is not the Court's task to substitute itself for the domestic authorities, but to review their decisions and their compliance with the Convention.

The Court held that the relationship between the applicants and their grandchildren, where the grandchildren had been left without parental care following the death of their mother and imprisonment of their father, clearly fell within the scope of Article 8 of the Convention.

The applicants complained that the courts failed to hear the views of W and Z. However, the Court noted that direct statements from the grandchildren were not heard by the domestic court because a child psychiatrist appointed by the court considered that they were not capable of forming an opinion on the matter, and the domestic court had instead considered an expert report prepared by that psychiatrist, who had directly examined the children. Further, the applicants did not present arguments that the representation of the grandchildren by V. Centre in the original proceedings affected the outcome of the proceedings. The Court therefore found no reason to call into question the domestic court's decision not to hear the children directly

The applicants also complained about the domestic court's refusal to examine the expert. In this respect, the Court held that, though the expert was not examined at the contact hearing, the first-instance court read his expert opinion and had a valid reason for not examining him. The applicants also had the opportunity to respond in writing and verbally to the report of the expert appointed by the first-instance court in place of the original expert. The Court held that this was not unreasonable and that the State complied with the procedural requirements of Article 8.

Accordingly, the Court found that there had been no violation of the applicants' rights under Article 8 of the Convention.

Article 41

The Court awarded the first applicant €3,000 in respect of non-pecuniary damage and €3,500 for costs and expenses.

Ineffective legal assistance via video link during criminal appeal proceedings violated Article 6

41. GRAND CHAMBER JUDGMENT IN THE CASE OF SAKHNOVSKIY v. RUSSIA

(Application no. 21272/03)
2 November 2010

1. Principal facts

The applicant, Sergey Sakhnovskiy, was born in 1979 and was at the time of the European Court's judgment serving a prison sentence for murder in the Novosibirsk region in Russia.

The applicant was arrested on 30 April 2001 on suspicion of having killed his father and uncle. Three days later, a legal-aid lawyer was appointed to represent him. In December 2001, the competent regional court found him guilty of murder and sentenced him to 18 years in prison. He appealed unsuccessfully in October 2002. No defence counsel attended the appellate hearing before the Supreme Court and the applicant participated in the hearing by video link.

The applicant filed several applications for supervisory review which were all refused without an examination on the merits.

In March 2007, the Court communicated the application to the Russian Government. In July of the same year, the Presidium of the Russian Supreme Court agreed to examine the case under the supervisory review procedure upon the request of the Russian Deputy Prosecutor General. The Presidium found that the applicant's right to legal assistance had been breached and sent his case for a fresh examination at the appellate stage.

In November 2007, the Supreme Court, sitting in Moscow, examined the case as an appellate instance. The applicant requested his personal presence at the hearing, but the Supreme Court found that his presence was not indispensable, and that a video link would be sufficient to ensure the applicant's effective participation in the proceedings. As a result, the applicant remained in Novosibirsk, some 3,000 km away from Moscow.

At the beginning of the hearing the Supreme Court introduced the applicant to his newly appointed legal-aid lawyer, who was present in the Supreme Court's hearing room, and allowed them 15 minutes of confidential talk by video link before the start of the examination of the appeal. Having talked to the legal-aid lawyer, the applicant refused to be assisted by her, arguing that he needed to meet his counsel in person. However, the Supreme Court did not grant that request and decided to proceed with the case immediately.

Following the hearing, the Supreme Court upheld the substantive findings and the applicant's sentence handed down in the December 2001 judgment.

2. Decision of the Court

Relying on Article 6 §§ 1 and 3, the right to a fair trial, the applicant complained that the criminal proceedings against him had been unfair. The applicant based his argument on the fact that he had not received free legal assistance and, because he participated in the court of appeal proceedings by video link, he was unable to effectively defend himself.

On 15 January 2009, in its Chamber judgment in the case, the Court found a violation of Article 6, given that the applicant had not received effective legal assistance during the appeal proceedings. The case was referred to the Grand Chamber under Article 43 upon a request by the Russian Government.

Article 6 § 1

The Court first examined whether the applicant had lost his victim status after the reopening of the criminal proceedings against him at the appellate level. The Court recalled the general principle that an applicant might lose their victim status if the authorities had acknowledged a breach of the Convention and if they had eliminated its negative consequences for the applicant. States should be given a chance to put right violations of the Convention, however, they could not be allowed to use that right in order to escape the Court's jurisdiction. In the applicant's case the proceedings had been reopened as part of the supervisory review procedure, which had not resulted in a reopening until the Court had notified the Russian Government of the applicant's application before it. That had been the situation in several other cases in respect of Russia which the Court had decided earlier. Under the supervisory review procedure there was no limit to the number of times the proceedings could be reopened, and it depended on the

discretion of a prosecutor or a judge. In that situation, the Court concluded that the Russian Government could have used the reopening by way of supervisory review as a means for evading the Court's examination of the case, and that the reopening of legal proceedings could not be automatically regarded as sufficient redress capable of depriving an applicant of their victim status.

Under Article 6 § 3 (c), every person charged with a legal offense has the right to "defend himself in person or through legal assistance". Article 6 § 3 © does not, however, specify exactly how that right is to be exercised. The Court recalled that, as a general principle under the notion of a fair trial, people charged with a criminal offense were entitled to be physically present at their first-instance trial hearing. However, that was not necessarily the case at the appellate stage as the attendance of the defendant in person did not necessarily take on the same significance for the appeal hearing. In determining whether an individual has a right to be physically present, the Court noted that consideration must be given to the nature of the proceedings, the extent to which the defendant's interests are presented and protected, and the significance of the issue to be decided for the appellant.

As regards the video link, while it was not, as such, contrary to the right to a fair trial, arrangements had to be made for the applicant to follow the proceedings, to be heard without technical impediments, and to communicate in an effective and confidential manner with their lawyer.

Given the complexity of the questions raised before the Supreme Court at the appellate stage in the applicant's case, the Court found the assistance of a professional lawyer was essential for the applicant. However, that assistance should have been effective and not only formal. As the only contact between the applicant and his lawyer had been for 15 minutes right before the start of the hearing, that had not been enough. In addition, the applicant had felt ill at ease about discussing the case via a video link which was installed and operated by the State. It was questionable whether communication by video link offered sufficient privacy.

While the Court accepted that transporting the applicant over 3,000 km to the hearing in Moscow would have been a lengthy and costly operation, a telephone conversation should have been organised between him and his lawyer well in advance of the hearing, or the applicant should have been appointed a local lawyer who could have personally visited him in detention prior to the hearing.

The Court concluded that the applicant had not been provided with effective legal assistance during the second set of appeal proceedings in November 2007.

In view of the above, the Court held that there had been a violation of Article 6 § 1 taken in conjunction with Article 6 § 3 (c) in the proceedings as a whole which had ended with the November 2007 judgment.

Article 41

The Court held that Russia was to pay the applicant €2,000 in respect of non-pecuniary damage, and €174 for costs and expenses.

VI. Private life/medical examination, treatment & research

The applicant's involuntary confinement at a psychiatric hospital violated Article 5, and subjecting him to treatment for scientific research and injuries violated the substantive aspect of Article 3

42. JUDGMENT IN THE CASE OF BATALINY v. RUSSIA

(Application no. 10060/07)
23 July 2015

1. Principal facts

The first applicant was born in 1977. The second and third applicants were his parents who were born in 1937 and 1938, respectively, and they all lived in Moscow. The first applicant was diagnosed with dystonia in 2004 for which he underwent various treatments without success. Having suffered for several months, he deliberately cut the veins on his forearm and was admitted to a psychiatric hospital on 25 May 2005 where he was diagnosed with a chronic pain disorder and a personality disorder. The next day he called his parents to take him home but once they arrived they were told by hospital staff that they were not allowed to take him home and were asked to leave.

The first applicant alleged that on the night of 26 May 2005, three nurses restrained him while two patients hit him in the face and body. He further alleged that he had lost consciousness when he was thrown on his bed by one of the nurses with such force that he hit his head on the bedside table. Finally, he alleged that once he had regained consciousness he found himself bleeding and strapped to the bed with a gag in his mouth. According to the first applicant, while at the psychiatric hospital he had been treated with a new antipsychotic drug and was forbidden from all contact with the outside world for the purposes of scientific research. He remained at the hospital until 9 June 2005.

Following his discharge, an ambulance doctor noted a haematoma under his eye, as well as bruises and contusions around his chest and waist. He was immediately taken to a city hospital where he was diagnosed with depressive anxiety against the background of traumatic brain damage. He remained there until 5 August 2005.

In October 2005, the applicants complained to the Russian Federation Ombudsman that the first applicant had been unlawfully confined to the psychiatric hospital, where he had also been beaten by the hospital's nurses and patients. Following two refusals to do so, criminal proceedings were finally brought in November 2006. The proceedings concerning the alleged beatings were suspended and re-opened on several occasions and were pending at the time of the judgment by the European Court. The complaint concerning his confinement became the subject of separate proceedings which were ultimately discontinued in November 2010.

Psychiatric medical care in Russia was governed by the Psychiatric Treatment Act 1992 ("the Act"). Sections 33-35 of the Act allowed for the judicial review of the lawfulness of an individual's psychiatric detention to be brought upon the hospital's application.

2. Decision of the Court

The applicants complained that the first applicant's forced psychiatric treatment in the absence of an established medical necessity and for use in scientific research, as well as the beatings during his confinement and a lack of an effective investigation into such beatings violated Article 3. They further alleged that his hospital confinement violated his right to liberty and security under Article 5 for which the first applicant had no remedy to challenge its lawfulness. Finally, the applicants alleged that the first applicant's psychiatric treatment violated Article 2 and that they did not have access to an effective domestic remedy contrary to Articles 13 and 17.

Article 5

The Government acknowledged that the first applicant's confinement in the psychiatric hospital between 25 May and 9 June 2005 was unlawful. The Court found no reason to hold otherwise. Therefore, it held that there had been a violation of Article 5 § 1 (e).

Moving on to consider Article 5 § 4, the Court stated that this provision only concerns the availability of remedies allowing an individual to seek his release from detention and not the availability of remedies to review the lawfulness of a detention which has already ended. The right of a patient detained for psychiatric treatment to seek judicial review of his detention of his own motion

is a key guarantee under Article 5 § 4. The Court had examined the possibility of seeking judicial review under the Act in previous case-law against Russia and had concluded that although the Act provided an important safeguard against arbitrary detention, it did not enable the detainee to seek judicial review of his own motion. The need for a detainee to have direct access to judicial review was emphasised in the present case by the hospital authorities' failure to apply for it, as a result of which the first applicant remained in hospital for two weeks.

The Government argued that the first applicant had a right to complain about the unlawfulness of his confinement under Article 254 of the Code of Civil Procedure. However, it had not provided examples which used this remedy in the context of psychiatric confinement before the domestic courts or the Court and had therefore failed to demonstrate its practical effectiveness. Accordingly, Government's objection that there had been non-exhaustion of domestic remedies was rejected. In conclusion, the Court held that the first applicant had not been entitled under domestic law to challenge his detention. Therefore, there had been a violation of Article 5 § 4.

Article 3

Subjecting a detained person to medical interventions against their will cannot in principle be regarded as inhuman or degrading where it has been deemed a therapeutic necessity by established medical practice. The Court noted that according to the 2008 report of the first applicant's forensic psychiatric examination, between 27 May and 9 June 2005 he did not have a "severe" mental disorder and therefore did not require psychiatric treatment. The Government did not provide any evidence to the contrary. Therefore, it had not been shown that there was a medical necessity to subject him to involuntary psychiatric treatment during this period.

The Court also noted that he had been administered an antipsychotic drug for scientific research and was prevented from having contact with the outside world. These circumstances were such as to arouse in him feelings of fear, anguish and inferiority which were capable of humiliating and debasing him. It was unacceptable to experiment with a new drug for scientific research without the subject's consent. Therefore, the first applicant had been subjected to inhuman and degrading treatment. Accordingly, the Court held that there had been a violation of Article 3 on account of his involuntary psychiatric treatment.

Next, the Court examined whether he had been subjected to beatings during his confinement and a lack of an effective investigation into the same. Where a person is injured in detention under the control of the authorities, there is a strong presumption that he was subject to ill-treatment. After his detention on the night on 26 May 2005, the first applicant suffered a haematoma under his right eye, as well as bruises and contusions to his chest and waist. The Government was unable to provide a satisfactory explanation for these injuries. As a result, the Court held that he had been subject to inhuman and degrading treatment and that there had been a violation of the substantive aspect of Article 3.

The medical evidence supporting the applicants' allegations of the first applicant's beating during his confinement gave rise to an obligation for the authorities to conduct an effective investigation into the circumstances of his injuries. However, the authorities did not open a criminal investigation into the matter for over a year after it had been brought to their attention. Such a delay had to have had an adverse impact on the investigation and undermined the authorities' ability to secure the appropriate evidence.

Further, the criminal proceedings were suspended on four occasions on the grounds that it was not possible to identify the perpetrators. The investigation was re-opened on appeal by the applicant in January 2013 and was pending at the time this judgment was issued. In view of the significant delay to open a criminal investigation based on the applicants' credible assertions and the fact that the proceedings were still pending some 10 years after the events, the authorities had failed to conduct an effective investigation into his injuries. Accordingly, the Court held that there had been a violation of the procedural aspect of Article 3.

Articles 2, 13 and 17

The second and third applicants were not victims of the alleged violations and therefore their complaint was rejected as incompatible with *ratione personae* with the Convention. Further, there had been no appearance of a violation of these rights and freedoms in respect of the first applicant. Therefore, the Court held that this part of the application was rejected as manifestly ill-founded.

Article 41

The Court awarded the first applicant €26,000 in respect of non-pecuniary damage and €2,000 for costs and expenses.

The decision to impose medical treatment without consent or recourse to the courts constituted a violation of Article 8

43. JUDGMENT IN THE CASE OF GLASS v. THE UNITED KINGDOM

(Application no. 61827/00)
9 March 2004

1. Principal facts

The first applicant, David Glass, was born in 1986 and was severely mentally and physically disabled requiring 24-hour attention. The second applicant, Carol Glass, was David's mother and legal proxy.

In July 1998 David was admitted to St Mary's Hospital, one of two hospitals belonging to the Portsmouth Hospitals National Health Service Trust (the trust). Following an operation to alleviate an upper respiratory tract obstruction, David suffered complications, became critically ill and had to be put on a ventilator. During his treatment, Ms Glass was informed by hospital staff that David was dying and that further intensive care would be inappropriate. However, David's condition improved and he was able to return home on 2 September 1998.

On 8 September 1998, when David was re-admitted to the hospital with a respiratory tract infection, doctors discussed with Ms Glass the possible use of morphine to alleviate distress. Ms Glass expressed her opposition, telling doctors that if David's heart stopped she would expect resuscitation including intubation. Dr W. considered that this would not be in David's best interests, and stated in his notes that a "second opinion", if necessary from the courts, was needed. Dr H. also noted that "in the event of total disagreement we should be obliged to go to the courts".

David's condition deteriorated. On 20 October 1998 the doctors treating David considered that he was dying and recommended that diamorphine be given to him to relieve his distress. Ms Glass did not agree that her son was dying and was very concerned that the administration of diamorphine (previously morphine had been mentioned) would compromise his chances of recovery. Ms Glass voiced her concerns at a meeting with the doctors at which a police officer was also present.

She subsequently asked to take David home if he was dying, but a police officer advised her that if she attempted to remove him, she would be arrested. David was given a diamorphine infusion at 7 p.m. on 20 October 1998.

A dispute broke out in the hospital involving other family members and the doctors. The family members believed that David was being covertly euthanised and attempted to prevent the doctors from entering his room. The hospital authorities called the security staff and threatened to exclude the family from the hospital by force.

A "Do Not Resuscitate" (DNR) order was put in the first applicant's medical notes without consulting Ms Glass.

The following day Ms Glass found that her son's condition had deteriorated alarmingly and was worried that this was due to the effect of diamorphine. The family demanded that diamorphine be stopped. Dr W. stated that this was only possible if they agreed not to resuscitate David. However, the family tried to revive David and a fight broke out between members of the family and the doctors. While the fight was going on, Ms Glass successfully resuscitated David.

Police were summoned to the hospital. Dr W. and Dr A. and several police officers were injured and all but one of the children on the ward had to be evacuated.

David's condition improved and he went home on 21 October 1998. Another hospital, about twenty-five miles from the family's home, stated that they were willing to admit and treat David should he suffer a further attack.

Ms Glass applied unsuccessfully for judicial review and permission to appeal to the Court of Appeal concerning the decisions taken by the hospital authority.

The General Medical Council found that the doctors involved had not been guilty of serious professional misconduct or seriously deficient performance and that the treatment complained of had been justified. The Crown Prosecution Service did not bring charges against the doctors involved for lack of evidence.

2. Decision of the Court

The applicants argued that United Kingdom law and practice failed to guarantee the respect for David's physical and moral integrity required by Article 8 of the Convention. In particular, the decisions to administer diamorphine to David against his mother's wishes and to place a DNR notice in his notes without her knowledge interfered with both their rights under Article 8.

They also maintained that leaving the decision to involve the courts to the discretion of doctors was a wholly inadequate basis on which to ensure effective respect for the rights of vulnerable patients.

Article 8

The Court considered that the decision to impose treatment on David in defiance of his mother's objections gave rise to an interference with his right to respect for his private life, and in particular his right to physical integrity. It considered that it was not required to examine whether the treatment concerned gave rise to an interference with Ms Glass's right to respect for her family life.

The interference was in accordance with the law. The regulatory framework in the United Kingdom was firmly based on the duty to preserve the life of a patient, save in exceptional circumstances. The same framework prioritised the requirement of parental consent and, save in emergency situations, required doctors to seek the intervention of the courts in the event of parental objection.

The action taken by the hospital staff pursued a legitimate aim. It was intended, as a matter of clinical judgment, to serve David's interests. The Court rejected any suggestion that it was the doctors' intention unilaterally to hasten David's death whether by administering diamorphine to him or by placing a DNR notice in his case notes.

In deciding whether the interference was necessary in a democratic society, the Court considered that the situation which arose at St Mary's Hospital between 19 and 21 October 1998 could not be isolated from the earlier discussions between members of the hospital staff and Ms Glass about David's condition. The doctors at the hospital were obviously concerned about Ms Glass' reluctance to follow their advice, in particular their view that morphine might have to be administered to her son. Both Dr W. and Dr H. had found that recourse to the courts might be necessary.

It had not been explained to the Court's satisfaction why the trust did not at that stage seek the intervention of the High Court. The doctors at that time all shared a gloomy prognosis of David's capacity to withstand further crises and they were left in no doubt that their proposed treatment would not meet with the agreement of his mother. Admittedly, Ms Glass could have brought the matter before the High Court. However, the Court considered that the onus was on the trust to take the initiative and to defuse the situation in anticipation of a further emergency. The Court accepted that the doctors could not have predicted the level of confrontation and hostility which in fact arose on 18 October 1998. It was nevertheless the case that the trust's failure to make a High Court application at an earlier stage contributed to the situation.

That being said, the Court was not persuaded that an emergency High Court application could not have been made by the trust when it became clear that that Ms Glass was firmly opposed to the administration of diamorphine to David. The trust was able to secure the presence of a police officer to oversee the negotiations with Ms Glass but, surprisingly, did not consider making a High Court application even though it would have been possible at short notice.

The Court considered that the decision of the authorities to override Ms Glass's objection to the proposed treatment in the absence of authorisation by a court resulted in a breach of Article 8.

In view of that conclusion, the Court did not consider it necessary to examine separately the applicants' complaint regarding the inclusion of the DNR notice in David's case notes without her consent and knowledge. It stressed, however, that the notice was only directed against the application of vigorous cardiac massage and intensive respiratory support, and did not exclude the use of other techniques, such as the provision of oxygen, to keep David alive.

Article 41

The Court awarded the applicants €10,000 for non-pecuniary damage and €15,000 for costs and expenses.

The authorities' refusal to allow cancer patients to use an unauthorised experimental drug did not violate the Convention

44. JUDGMENT IN THE CASE OF HRISTOZOV AND OTHERS v. BULGARIA

(Application nos. 47039/11 and 358/12)
13 November 2012

1. Principal facts

The applicants were 10 patients suffering from cancer who complained that they had been denied access to an unauthorised experimental drug. They had tried a variety of conventional treatments or obtained a medical opinion that such forms of treatment would not work in their respective cases when they approached a private clinic, which told them about an experimental anti-cancer treatment which was being developed by a Canadian company. This treatment had not been authorised in any country, but had been allowed for "compassionate use" in a number of countries. In a letter of 9 January 2011, the company informed the Bulgarian Ministry of Health that it would provide the drug free of charge for use on terminal cancer patients in return for data on the effects of the treatment.

The applicants applied to the authorities for permission to use the treatment. Their request was refused by the authorities in letters of June – August 2011 which stated that Bulgarian law only allowed for the use of treatment which had been authorised in another country. The Bulgarian Ministry of Health confirmed this position on appeal by the applicants. Three of the applicants applied to the Bulgarian Ombudsman who also confirmed this position.

2. Decision of the Court

The applicants complained that the authorities' refusal to allow them to use an experimental drug violated Articles 2, 3 and 8 of the Convention.

Article 2

The authorities' acts and omissions in the field of health care policy may engage Article 2, and imposes an obligation to put in place an appropriate legal framework to protect the lives of patients within its jurisdiction. The applicants alleged that

Bulgarian law should have provided them with an exception to access unauthorised experimental treatment on the basis that the conventional treatment administered to them had been ineffective. The Court noted that Bulgaria did have regulations which allowed access to unauthorised treatment in the event that conventional treatment appeared insufficient provided that the treatment had been authorised in another country. Article 2 does not require access to unauthorised treatment for terminally-ill patients to be regulated in a particular way. Therefore, Bulgaria did not go beyond the margin of appreciation afforded to it. It also noted that under European Union law, this matter remained within the competence of member states. Accordingly, there had been no violation of Article 2.

Article 3

As a fundamental value of democratic society, the prohibition of torture and inhuman or degrading treatment is absolute. Article 3 is most commonly applied where the relevant treatment has emanated from intentional acts of the State or its authorities. However, the Court considered that Article 3 may also be applicable where suffering from a naturally occurring illness was exacerbated by treatment which was dictated by measures for which the authorities were responsible. However, the severity threshold in these cases is high given the harm originates from the illness and not the acts or omissions of the authorities.

The claim in the present case put an extended construction on the meaning of "inhuman or degrading treatment" which the Court could not accept. The authorities did not directly add to the applicants' physical suffering by denying access to a drug the safety and efficacy of which were in doubt, even if the drug was potentially-life saving. While this refusal had caused the applicants some mental suffering, especially given the drug was available on an exceptional basis in some other countries, it did not reach the minimum level of severity required to amount to "inhuman treatment" within the meaning of Article 3. Article 3 did not impose an obligation on States to eliminate disparities between its level of health care and those of other countries. Finally, a mere refusal could not be regarded as having humiliated or debased the applicants. Therefore, the Court held that there had been no violation of Article 3.

Article 8

The applicants' complaint that the regulatory framework limited their capacity to choose their medical treatment fell within the scope of Article 8 as it involved

questions over their personal autonomy and quality of life which form part of an individual's private life. The Court considered that it was not necessary to determine whether the central issue to the case involved an interference with the right to respect for their private life or a failure of the State's positive obligation to ensure respect for their private life. In any event, it would examine whether the State had struck a fair balance between the applicants' interests and those of the community as a whole. Health care policies are, in principle, within the States' margin of appreciation as they are in the best position to assess social needs, priorities, and the use of resources.

The applicants' interest was the freedom to risk taking an unauthorised treatment to attempt to save their lives. Given their prognosis, they had a stronger interest than other patients to take an experimental treatment the safety and efficacy of which were unchecked. The public interest in this case was threefold. Firstly, to protect the lives of the applicants, in view of their vulnerable state, against the potential risks of an experimental treatment, notwithstanding their terminal prognosis. Secondly, to ensure that the prohibition against the use of unauthorised medical treatment was not diluted or circumvented. Thirdly, to ensure that the development of new medical treatment was not compromised for example, by diminished patient participation in clinical trials. The first interest was specifically related, and the second and third more generally related, to the rights guaranteed under Articles 2, 3 and 8.

According to the comparative-law information that was available to the Court, there was a trend among Contracting States to include the case of terminally ill patients as an exception to the rule that only authorised treatments may be used. However, that consensus was not based on settled principles in their law, nor did it extend to the manner in which it should be regulated. Therefore, the State's margin of appreciation in this case was a wide one, especially given its detailed rules aimed at achieving a balance between public and private interests.

The State had chosen to balance these competing interests as follows: where a terminally ill patient's authorised treatment appeared unsatisfactory, the authorities allowed the use of experimental treatment which, although unauthorised in Bulgaria, was authorised in another country. This was the main reason behind the authorities' refusal to allow the applicants' desired treatment. This solution tilted the balance between the potential therapeutic benefit and medical risk avoidance decisively in favour of the latter given a treatment which is authorised in another country is likely to have undergone comprehensive

testing for safety and efficacy. However, in light of the State's broad margin of appreciation, the solution was not contrary to Article 8. The question under Article 8 was not whether a different solution could have struck a fairer balance but whether the balance struck exceeded the margin of appreciation afforded to the State. Further, it was not in itself contrary to Article 8 for a State to regulate important aspects of private life without making provision for the weighing of competing interests in the circumstances of each individual case. Accordingly, the Court held that there had been no violation of Article 8.

Article 13

As the alleged breaches of Articles 2, 3 and 8 stemmed from the state of Bulgarian law, no issue arose under Article 13. Therefore, this part of the application was rejected as manifestly ill-founded.

A decision to dissolve a religious community to prevent the encouragement of suicide or refusal of medical assistance violated Article 9 interpreted in the light of Article 11

45. JUDGMENT IN THE CASE OF JEHOVAH'S WITNESSES OF MOSCOW AND OTHERS v. RUSSIA

(Application no. 302/02)
10 June 2010

1. Principal facts

The applicants were the religious community of Jehovah's Witnesses of Moscow, established in 1992, and four individual members of that community who lived in Moscow. This branch obtained legal-entity status in December 1993. In pursuit of their religious beliefs, members of the applicant community carried a "No Blood" card which stated their refusal to receive blood transfusions under any circumstances. However, it also stated their consent to the use of blood substitutes and other bloodless methods of treatment.

Following complaints from a non-governmental organisation aligned with the Russian Orthodox Church, the district prosecutor brought a civil action to dissolve the applicant community and ban its activities. The prosecutor cited various charges including the encouragement of suicide or refusal on religious grounds of medical assistance to persons in life or health-threatening conditions. The district court initially dismissed the proceedings however the prosecutor's appeal was upheld in March 2004 on the basis that the applicant community encouraged suicide and the refusal of medical assistance, among other things.

In the meantime, the Law on the Freedom of Conscience and Religious Associations ("the Religious Act") entered into force in October 1997 and required all religious associations to re-register with the Justice Department. The applicant community unsuccessfully applied for re-registration five times from October 1999 to January 2001. In August 2002, a district court found that the Justice Department had unlawfully refused the applicant community's applications. However, it did not order re-registration and indicated that the applicant community must submit a fresh application.

2. Decision of the Court

The applicants alleged that the State's dissolution of their religious community and its refusal to re-register their organisation violated their rights under Articles 9 and 11 of the Convention. The Court examined the complaint against a number of justifications offered by the State. However, this summary will focus only on the State's assertion that its decision to dissolve the applicant community was necessary to prevent its encouragement of suicide and refusal of medical assistance. The applicants also complained that the excessive length of the civil proceedings to dissolve their community violated Article 6.

Article 9 interpreted in the light of Article 11 on account of dissolution of the applicant community

Freedom of thought, conscience and religion is one of the foundations of a democratic society and includes the freedom to manifest one's religion in private or in a community with others. As religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11, which protects the freedom to associate from unjustified State interference. The State's duty of impartiality, as outlined by the Court's case-law, is incompatible with any power to assess the legitimacy of religious beliefs. While a State has a right to check that the aims and activities of an association comply with rules laid out in legislation, it must do so in a manner which is compatible with its obligations under the Convention. Exceptions to the freedom of association are to be construed strictly and only with a convincing and compelling justification which corresponds to a "pressing social need".

The Russian court's decision to ban the activities of the applicant community effectively stripped it of its legal identity and therefore its right to own or rent property, to maintain a bank account, to hire employees, and to ensure judicial protection of its community. Hence the decision interfered with the applicants' right to manifest their religion in community with others and carry out their religious practice under Article 9 interpreted in the light of Article 11. This interference was based on provisions of the Religious Act and was therefore "prescribed by law". Further, it pursued the legitimate aim of the protection of health and rights of others listed in Articles 9 and 11. The Court then examined whether the interference was "necessary in a democratic society" against each ground invoked by the State. The State argued that the dissolution of the applicant community was justified on the grounds that it had: (i) forced the families of its

members to break up; (ii) infringed the rights and freedoms of Russian citizens; (iii) encouraged suicide or the refusal of medical assistance; (iv) damaged the health of its followers; (v) lured minors into the religious organisation; and (vi) incited citizens to refuse their civic duties. This summary will focus only on whether it was necessary in a democratic society to ban the applicant community's activities on the grounds that it encouraged suicide or the refusal of medical assistance.

The Court observed that the Russian courts did not elaborate on the allegations of encouragement of suicide. The refusal of a blood transfusion could not be considered tantamount to suicide as the latter would involve the intention to hasten death through a discontinuation of treatment. In contrast, rather than excluding treatment altogether, Jehovah's Witnesses maintain a hope to recover and merely make a choice as to medical procedures. Therefore, the charge that the applicant community encouraged suicide had no basis in fact. Accordingly, the Court only continued to examine whether the Jehovah's Witness members refused medical assistance as a result of pressure from their community.

It was known that Jehovah's Witnesses believe that the Bible prohibits ingesting blood, including by way of blood transfusion. The prohibition allows no exceptions; not even in cases where it is deemed necessary to save the individual's life. The Court recognised that the refusal of life-saving treatment on religious grounds involved a conflict between the State's interest to protect the lives of its citizens and the individual's right to physical and religious autonomy. Respect for human dignity, freedom, notions of self-determination and personal autonomy form part of the very essence of the Convention. The freedom to conduct one's life at one's own choosing includes the ability to pursue activities which may be physically harmful or dangerous to him or her. Further, the imposition of medical treatment without the individual's consent would interfere with his or her right private life under Article 8, even if it was necessary to prevent death.

The Court noted that many established jurisdictions had already examined similar Jehovah's Witness cases and held that while the public interest to preserve the lives of patients is extremely strong, it had to yield to the patient's stronger interest to freely direct their own life. The Court further emphasised that unless there is a need to protect third parties, for example by compulsory vaccination during an epidemic, the State must abstain from interfering with individuals' freedom to choose their own health care. As free choice and self-determination are fundamental constituents of life, such an interference would lessen rather than enhance the value of their life.

However, the Russian courts had found that the refusal had not been an expression of the applicants true will but the result of pressure from their community. Where a patient's health and possibly life are at stake, the authenticity of their refusal for medical assistance is a legitimate concern. That said, the right to "try to convince one's neighbour" was recognised as an essential element to religious freedom. The Court distinguished between the position of servicemen who could not withdraw from religious conversations initiated by their superiors, which could be viewed as a form of harassment or improper pressure, and a conversation between civilians, which would be described as a free and innocent exchange of ideas. In the present case, there was no indication from the domestic judgments that there had been any form of improper pressure or undue influence applied by the community. Rather it seemed as though many of the members had made a deliberate choice to refuse the blood transfusion, prior to the pressure of a medical emergency, by filling out "No Blood" cards which they carried on their person. Therefore, there was no factual basis to the Russian court's finding that the refusal of the blood transfusion was not an expression of the members true will.

The State does not have the right under the Convention to decide what beliefs are legitimate as the right to freedom of religion excludes it from any such discretion. In conclusion, the Court found that the Russian courts did not show any "pressing social need" of "relevant and sufficient reasons" to justify a restriction on the applicants' right to personal autonomy as to religious beliefs and physical integrity. Overall, the sanction pronounced by the Russian courts was excessively severe and disproportionate to the legitimate aim pursued. Accordingly, there had been a violation of Article 9 read in the light of Article 11.

Other violations

The grounds for the refusals to re-register the applicant community had no lawful basis since there was no finding that it had breached any domestic law. As such, the authorities' refusal was not in good faith and had neglected their duty of neutrality and impartiality to the applicant community. Therefore, there had been a violation of Article 11 read in the light of Article 9.

Article 6 imposes on the State an obligation to organise their judicial system in such a way that it may decide cases within a reasonable time. The complexity of the present case could not explain the excessive length of the civil proceedings (six years) to dissolve the applicant community. Accordingly, the State had failed in its obligation and there had been a violation of Article 6 § 1.

Article 41

The Court awarded the applicants €20,000 in respect of non-pecuniary damage and €50,000 for costs and expenses.

Lack of parental consent for medical investigation of nine-year old, who was a suspected victim of sexual abuse by her father, and associated delay in dermatologist referral violated her and her father's rights under Article 8

46. JUDGMENT IN THE CASE OF M.A.K. and R.K. v. THE UNITED KINGDOM

(Application nos. 45901/05 and 40146/06)
23 March 2010

1. Principal facts

On two occasions, in September 1997 and February 1998, the first applicant took his nine-year-old daughter (the second applicant) to their family doctor due to concern about what appeared to be bruising on her legs. This was followed by a visit, in March 1998, to a paediatrician, who had blood samples and photographs of the second applicant taken in the absence of both parents and despite the father's indication that any tests should be done in the mother's presence, or with her explicit consent. Upon her arrival to the hospital, the second applicant's mother gave consent for further examination, and was subsequently informed by the paediatrician that there was evidence of sexual abuse. No questions about the suspected abuse were put to the second applicant. The first applicant was not allowed to visit the second applicant at all that day and thereafter only under supervision.

Although in the interim the mother had informed the paediatrician that the second applicant had recently complained that she had hurt herself riding her bicycle, the paediatrician was insistent that there had been sexual abuse. A few days later, after the second applicant's mother noticed marks on her hands, she was referred to a dermatologist. Six days after this, the applicant was diagnosed with a rare skin disease and discharged from hospital. The paediatrician then wrote a letter stating that there was insufficient evidence to consider that she had been abused.

Following a complaint by the applicants, an Independent Review Panel found that the second applicant should have been interviewed about the marks on her skin and that, while the paediatrician was not to be blamed for misdiagnosing the bruises, a dermatologist's opinion should have been sought as a matter of urgency. The applicants were unsuccessful in proceedings in negligence against

the local authority and hospital trust. Both were legally aided during first instance proceedings, but the second applicant had her legal aid withdrawn during subsequent appeals.

2. Decision of the Court

The first applicant complained he suffered distress and humiliation as a result of the accusations against him, violating his rights under Article 3. The applicants further complained, under Article 8, about the visiting restrictions during the period the second applicant was in hospital and that the blood sample and photographs were taken without parental consent. The second applicant complained, under Article 6, that legal aid was withdrawn from her during appeal proceedings. Lastly, the first applicant complained under Article 13, that he could not claim for compensation for damage caused by the local authority's handling of his daughter's case on account of the domestic courts' finding that there was no common law duty of care owed to parents.

Article 3

While child-protection measures were generally liable to cause parents distress and, on occasion, humiliation if they were suspected of failing in their parental responsibilities, it would be contradictory to the effective protection of children's rights to hold that authorities were automatically liable to parents under this provision whenever they erred, reasonably or otherwise, in execution of their duties. There consequently had to be a factor apart from the normal implementation of those duties for the matter to come within the scope of Article 3. While the Court did not doubt the first applicant's distress at being mistakenly suspected of abuse, this did not constitute a special element such as to cause his suffering to go beyond that inherent in the implementation of the measures.

Therefore, the Court concluded that the complaint under Article 3 was inadmissible.

Article 6

It was noted that, where civil proceedings involve complicated points of law and the applicant cannot afford legal representation, the denial of legal aid could amount to a restriction of access to court. Where this was the case, the refusal will only be compatible with the Convention if it is pursuant to a legitimate aim

and proportionate to that aim. The reason for withdrawing legal aid from the second applicant was to meet the legitimate concern that, in the absence of public interest, public money should only be available to applicants whose claims were likely to result in an award of damages that was greater than the cost of funding the case. It was further noted that the United Kingdom's legal system offered guarantees to protect individuals from arbitrariness, such as the possibility to appeal withdrawn aid to the Independent Funding Review Committee.

Therefore, the Court concluded that, even if the withdrawal of legal aid constituted a restriction on the second's applicant right of access to court, it was legitimate and proportionate, meaning her complaint under Article 6 was inadmissible.

Article 8

With regards to the applicants' visitation restrictions during the ten days the second applicant was hospitalised, it was undisputed there had been a violation of both applicants' rights to respect for their family life.

Though the restrictions pursued the legitimate aim of protecting the rights of the second applicant, there was no legal basis for them on the night of the second applicant's admission, and the Court therefore held it violated both applicants' rights under Article 8. Thereafter, although the first applicant was granted visiting rights for the remainder of the second applicant's stay in hospital, this was under supervision and so constituted a continuing interference. That interference was in accordance with the law and pursued the legitimate aim of protecting the second applicant's rights. As to whether the interference had been necessary in a democratic society, it had been reasonable, in view of the available evidence, for the paediatrician to suspect abuse and contact social services. While it must have been frustrating for the parents that the information about the bicycle accident had apparently been ignored, the continued suspicions of the local authority had been justified as the parents were themselves under suspicion and any explanation they provided had to be treated with caution. In any event, the bicycle accident only accounted for one of the apparent injuries.

The Court was, however, concerned about two of the Independent Review Panel's other findings. As to the need to interview the second applicant about the abuse allegations, the Court found this not to have been indispensable as, even in case of her denial of any abuse, it was unlikely that abuse could have been

excluded as a possible cause of her injuries. Of greater concern was the panel's finding that a dermatologist's opinion should have been obtained as a matter of urgency. It was not until four days after the second applicant's admission to hospital, when the mother noticed marks on her hands, that a dermatologist had been consulted. Accordingly, while there had initially been relevant and sufficient reasons for the authorities to suspect abuse, the delay in consulting a dermatologist had prolonged the interference and was not proportionate to the legitimate aim of protecting the second applicant from harm. There had thus been a violation of both applicants' rights to respect for their family life.

With regard to the tests and photographs conducted without parental consent, domestic law and practice clearly required the consent of parents or those exercising parental responsibility before any medical intervention could take place. The parents had given express instructions that no further tests were to be carried out until the mother's arrival. In view of those instructions, the only possible justification for the decision to proceed with the blood test and photographs was that they were required as a matter of urgency. However, there was no evidence to suggest that the second applicant's condition was critical, deteriorating or likely to deteriorate, or that she was in any pain or discomfort. Nor had there been any reason to believe that the mother would have withheld consent and, even if she had, the hospital could have sought a court order authorising the tests. In the circumstances, there had been no justification for the decision to take a blood test and intimate photographs of a nine-year-old girl, against the express wishes of both her parents, while she was alone in hospital. The interference with the second applicant's private life was, therefore, not in accordance with domestic law and so the Court held there was a violation of Article 8.

Article 13

The first applicant had had no means available to him of claiming that the local authority had been responsible for any damage which he had suffered and of obtaining compensation for that damage. Therefore, the Court unanimously concluded that there had been a violation of Article 13.

Article 41

The Court awarded €2,000 to the first applicant and €4,500 to the second applicant in respect of non-pecuniary damage, and €15,000 jointly in respect of costs and expenses.

A complaint that the authorities' refusal to refund the full cost of a life-saving drug violated Article 2 was declared inadmissible

47. DECISION IN THE CASE OF NITECKI v. POLAND

(Application no. 65653/01)
21 March 2002

1. Principal facts

The applicant was born in 1932 and lived in Bydgoszcz. He was diagnosed with amyotrophic lateral sclerosis (ALS) in 1976. In June 1999, he was prescribed with Rilutek, a drug used to treat ALS. He asked the Kujawko-Pomorski Health Insurance Fund ("the Fund") to refund the full cost of the drug. The Fund replied in a letter of 28 June 1999, stating that four out of five of his drugs were fully refunded, except Rilutek, which was covered by a 70% refund.

The applicant applied to the regional office to quash this decision, submitting that he could not afford the drug and that he had no children to assist him. The applicant also submitted to the Court that he had been making social security contributions for 37 years. The regional office transferred the application to social services which declined this application in August 1999 and noted that his family income was above its statutory threshold for further assistance. He also received a letter from the Ministry of Health and Social Services which confirmed the Fund's decision.

In September 1999, the applicant's degree of invalidity was increased from the second to the first degree. Upon his appeal to the Supreme Court, he was informed that no appeal was available against such decisions of the Ministry of Health and Social Security.

2. Decision of the Court

The applicant complained that the State's refusal to refund the full price of a life-saving drug violated his right to life under Article 2 of the Convention. He also alleged that it violated Articles 8 and 14.

Article 2

The acts and omissions taken by authorities in the field of health care policy may engage Article 2. Further, Article 2 may be applicable where it can be shown that the authorities put an individual's life at risk through the denial of health care which they had undertaken to make available to the population generally.

In the present case, the Court noted that the applicant enjoyed standard public health care including free drugs and medical treatment by virtue of his social security contributions. The standard public health care scheme provided a 70% refund for Rilutek. In view of the medical treatment and facilities provided to the applicant, including the 70% refund for Rilutek, the State could not be said, in the special circumstances of the case, to have failed to discharge its obligations under Article 2 by not paying the remaining 30% of the drug price.

Therefore, the Court rejected this part of the application as manifestly ill-founded.

Article 8

In light of its conclusion under Article 2, the Court considered that no separate issues arose under Article 8.

Article 14

Article 14 only prohibits differences in treatment which have no objective or reasonable justification. In this case, this was the fair distribution of limited public resources. Further, there was no evidence of arbitrariness involved in the Fund's decision. Therefore, this part of the application was rejected as manifestly ill-founded.

Failure to comply with legal safeguards when conducting a search of the applicant's office and disclosing his psychiatric data violated Article 8, and he did not have access to an effective remedy in contravention of Article 13

48. JUDGMENT IN THE CASE OF PANTELEYENKO v. UKRAINE

Application no. (11901/02)
29 June 2006

1. Principal facts

The applicant was born in 1960 and lived in Chernigiv. In May 1999, criminal proceedings were brought against him for abuse of power and forging official documents as a private notary. The authorities seized a number of his personal possessions as they carried out a search order in respect of his office issued by the Chernigiv Prosecutor. The criminal proceedings were discontinued by the Desniansky District Court in August 2001 on non-exonerating grounds due to the insignificance of the offence. His complaint that the decision should have been on exonerating grounds was refused by the District Court which emphasised that there had been sufficient evidence collected during the investigation to establish that he had committed the offence. The Court of Appeal and Supreme Court upheld this decision.

The applicant brought proceedings seeking compensation from the Prosecutor's office for damage suffered as a result of the unlawful search of his office. In August 2000, the Novozavodsky District Court declared that the search of his office unlawfully breached Articles 183 and 186 of the Code of Criminal Procedure in failing to serve the search warrant on him despite knowledge of his whereabouts and seizing his personal items which were not directly relevant to the case. However, it rejected the claim on the basis that the criminal proceedings had been terminated on non-exonerating grounds. His appeal was rejected by the Court of Appeal.

Finally, in December 2001, the applicant instituted proceedings against the Chernigiv Law College and its Principal for defamation in respect of three libellous statements made by the Principal during a hearing of the Attestation Commission, including one questioning his mental health. The Novozavodsky Court requested, obtained, and disclosed to the courtroom evidence from a hospital relating to his mental health and psychiatric treatments, only to reject

his claim as unsubstantiated. In October 2002, the Court of Appeal upheld this decision and issued a separate ruling condemning the Novozavodsky Court's failure to use the special regime required for psychiatric data under Article 32 of the Constitution and Articles 32 and 31 of the Data Act 1992. The applicant unsuccessfully requested leave from the Supreme Court to appeal under the cassation procedure.

2. Decision of the Court

The applicant complained that the unlawful search of his office and the disclosure of confidential information regarding his mental health and psychiatric treatment at a court hearing violated his right to respect for his home and private life, respectively, under Article 8 of the Convention. He further complained that the authorities' refusal to pay him under the domestic compensation scheme for unlawful criminal prosecution violated the presumption of innocence under Article 6 § 2. Finally, he alleged that there was a lack of effective remedies to the violations suffered under Article 8 and that this violated Article 13.

Article 8

The Court first established that the search of the applicant's office interfered with his right to respect for his home under Article 8. It was unnecessary to discuss whether the wider margin of appreciation enjoyed by the State for searches of business premises as opposed to dwellings.

For the interference to be lawful, it must have been made in "accordance with the law." In Chapter 16, the Criminal Code of Procedure provided safeguards requiring a search warrant to be served on the person occupying the premises in advance of the search, and prohibiting the seizure of items and documents which did not directly relate to the investigation. The Court noted that in its decision of August 2000, the Novozavodsky Court held that the search was unlawful on the grounds that the authorities had failed to observe these safeguards. The authorities did not serve the applicant with a search warrant despite knowing his whereabouts and seized personal documents which clearly did not relate to the case. Therefore, the interference was not "in accordance with the law" and violated Article 8. As such, it was unnecessary to examine whether it was "in pursuit of a legitimate aim" and "necessary in a democratic society."

Moving on, the Court then considered whether the disclosure of confidential information regarding his mental health and psychiatric treatment at a court hearing interfered with his right to respect for private life under Article 8. The Court answered this in the positive, as the disclosure widened the group of persons privy to the confidential information.

The Government did not contest that the measure did not comply with the special regime applicable to the collection, retention, use, and dissemination of psychiatric data under Article 32 of the Constitution, and Articles 23 and 31 of the Data Act 1992. The measure was therefore unlawful under Article 6 of the Psychiatric Medical Assistance Act 2000. The merits of the defamation claim could not affect this finding since the data requested was not relevant to the pre-trial investigation. Accordingly, the Court held that the disclosure was not "in accordance with the law" and violated Article 8. In view of this conclusion, there was no need to examine any possible justification of the measure.

Article 6 § 2

The Convention must be interpreted in a way which protects rights that are practical and effective rather than theoretical and illusory. Article 6 § 2 does not guarantee a right to compensation or reimbursement of costs where criminal proceedings have been discontinued. However, the Court's case-law has established that the presumption of innocence is infringed where a judicial decision in criminal proceedings reflects the opinion that the defendant is guilty without having been proved guilty by law. The scope of Article 6 § 2 extends to judicial decisions made after a prosecution has been discontinued or an acquittal.

The Court noted that in the compensation proceedings, the Novozavodsky Court and the Court of Appeal clearly expressed a view that the applicant had committed the offence. Further, in the criminal proceedings, the Desniansky Court had emphasised that while there had been sufficient evidence to establish that he had committed the offence, the proceedings would be discontinued due to the insignificance of the offence. The Desniansky Court's language was sufficient to breach the presumption of innocence since the proceedings before it lacked the common elements of a criminal trial. The rejection of his claim for compensation on the basis of these findings merely exacerbated the matter. In conclusion, the Court held that the reasons provided by the Desniansky Court, combined with the rejection of his claim for compensation on the basis of those reasons, infringed the presumption of innocence and violated Article 6 § 2.

Article 13

The Court first considered whether there was an effective remedy for the unlawful search of the applicant's office. While he could have sought a declaration from a higher prosecutor that the search was unlawful, this remedy would not have afforded him any relief. The possibility to seek compensation for unlawful prosecution did not apply here since the applicant's claim was rejected on the basis that the criminal proceedings had been terminated on non-exonerating grounds. Further, the criminal proceedings could not assess the lawfulness of the search, having been terminated at a pre-trial stage.

Next, the Court considered whether there was an effective remedy for the disclosure of the applicant's psychiatric information. The possibility of an "in camera" hearing of the case could not have limited access to the case file nor secured the confidentiality of the information disclosed in the hearings. Significantly, the Court of Appeal did not discontinue the disclosure of the confidential psychiatric data nor did it award any compensation to the applicant, despite its finding that the disclosure was unlawful.

Therefore, there was a violation of Article 13 in that he had no effective remedy to enforce his right to respect for home and private life under Article 8.

Article 41

The Court awarded the applicant €2,315 in respect of pecuniary damage, and €3,000 in respect of non-pecuniary damage.

Claims that insufficient State funding for the applicants' medical treatment violated the Convention held inadmissible

49. DECISION IN THE CASE OF PENTIACOVA AND OTHERS v. MOLDOVA

(Application no. 14462/03)
4 January 2005

1. Principal facts

The applicants suffered from chronic renal failure requiring haemodialysis treatment which they received from a Chişinău hospital ("the SCR"). They all received a disability allowance between 60 Moldovan Lei ("MDL") and MDL 450 (equivalent of approximately €4 to €27 at the time). They submitted that before 1997, their haemodialysis treatment was fully covered by the State but that from 1997 to 2004 only treatment and medication which was strictly necessary was provided free of charge. From 1 January 2004 Moldova implemented a new medical insurance system ("the 2004 reform") following which the applicants received almost all of their necessary medication for free.

The applicants submitted that in the United States, Canada and European Union countries, patients with renal failure received three haemodialysis sittings at a total 9 hours per week. Moldova provided the same level of treatment before 1997. However, after 1997 Moldovan patients only received two haemodialysis sittings at a total of 8 hours per week, and only those "in a bad physical condition" were allowed to undergo a third haemodialysis sitting. Further, they claimed that their disability allowance was insufficient to cover the cost of the medication necessary for haemodialysis and they were therefore subject to unbearable pain and suffering. According to the applicants, some patients refused to undergo the treatment without this medication and died as a result. Finally, some of the applicants who lived in the provinces alleged that they had not been reimbursed for their travel expenses to Chişinău to receive haemodialysis, despite a practice among local authorities to do so.

In 2003, thirty-two doctors from the SCR's haemodialysis department signed a letter addressed to the applicants and several Chişinău newspapers stating that the death rate of patients with renal failure had diminished tenfold since the 1980's and that their State funding had increased threefold over the last two

years. They also stated that their patients received the same treatment as patients from other Chişinău hospitals.

2. Decision of the Court

The applicants alleged that the State's failure to finance the haemodialysis treatment violated their right to life under Article 2 of the Convention and caused them suffering contrary to Article 3. They also alleged that they were consequently forced to spend their families' money on their treatment, interfering with their right to family life under Article 8. They further alleged that their standard of care was worse than those of patients at another Chişinău hospital financed by a local budget and that administrative barriers prevented non- Chişinău residents from seeking treatment there contrary to Article 14 in conjunction with Articles 2, 3 and 8. Finally, they complained that they did not have access to an effective remedy contrary to Article 13.

Article 8

Although the applicants' withdrew this complaint without explanation, the Court reiterated that it was the master of legal characterisation of the facts in a case and considered it necessary to examine both the lack of State funding for haemodialysis and the local authorities' failure to cover the applicants' travelling expenses under the right to respect for private life.

States have a positive obligation to prevent arbitrary interference with individual's right to private and family life. Ultimately, they must strike a fair balance between the interests of individuals and the community as a whole. The Convention does not guarantee a right to free medical care. However, the Court had previously held Article 8 applicable to complaints about public funding concerned with the physical and psychological integrity of disabled patients. Therefore, it found that Article 8 applied to the applicants' complaint about insufficient funding of their treatment.

The Court acknowledged the difficulties allegedly suffered by the applicants as well as the very real improvement that full coverage would have involved for their private and family lives. However, given the national authorities' familiarity with both the demands of the health care system and its public budget, they were in a better position than the Court to decide on the allocation of limited State funds. Therefore, the margin of appreciation afforded to the State in this case was wide. Although it was desirable for all patients to have full access to life-saving medical treatment,

limited resources meant that this was not always possible, particularly in cases of permanent and expensive treatment. It noted that the applicants had been provided with appropriate basic medical care and basic medication before the 2004 reform and were provided with almost full medical care after it. The State had therefore not failed to strike a fair balance between their interests and those of the community as a whole. Further, given the applicants' situation had considerably improved after the 2004 reform, the State had not failed to discharge its positive obligation under Article 8. For these reasons, the Court rejected the complaint as manifestly ill-founded.

Article 2

Article 2 is relevant where a State has undertaken to provide public health care and its denial puts an individual's life at risk. However, the applicants failed to provide any evidence that their lives had been put at risk. The Court noted that chronic renal failure was a progressive disease which had a high rate of mortality all over the world. Therefore, the claim that a number of patients had died was not sufficient to demonstrate a failure to protect the right to life without evidence that they were caused by a lack of appropriate medical care. With respect to the State's positive obligations, the Court found that there was no reason to depart from its conclusions under Article 8. As a result, the Court rejected this part of the application as manifestly ill-founded.

Article 3

Given its finding under Article 8, the Court considered that no separate issue arose under Article 3.

Article 13

Article 13 guarantees an effective domestic remedy to respond to an arguable complaint under the Convention. The applicants had not raised any arguable complaints under the Convention and therefore the Court held that this part of the application was inadmissible.

Article 14 in conjunction with Article 2 and 3

The applicants had not submitted any evidence to show that the other Chişinău hospital was better financed and provided better treatment. Therefore, the Court held that this part of the application was also inadmissible.

Forcible catheterisation of the applicant to obtain evidence of his involvement in a drink-driving offence violated Article 3

50. JUDGMENT IN THE CASE OF R.S. v. HUNGARY

(Application no. 65290/14)
2 July 2019

1. Principal facts

The applicant was born in 1980 and lived in Püspökladány. On 6 March 2010, he was involved in a fight outside a nightclub, allegedly under the influence of drugs and alcohol. He was later stopped by the police in his car, refused to take a breathalyser test and arrested for questioning.

He was taken to the hospital by four police officers for a blood and urine test. Once there, he told the doctor that he was unable to urinate. At the request of the police officers, the doctor carried out a catheterisation and a blood test while the applicant was handcuffed. The applicant was later fined for failing to comply with lawful police measures. However, that decision was overturned on the basis that the police measure was not lawful since the procedure had been carried out without the applicant's written consent, as was required by domestic law.

On 6 March 2010, the applicant lodged a criminal complaint against the police officers. The authorities questioned the doctor, a nurse, a driver on duty at the hospital, the applicant and the police officers. The applicant stated that he had never consented to the procedure and alleged that leg restraints had been used. However, the police alleged that he had consented and only began to protest once the procedure had started. All the witnesses had agreed that the applicant had been intoxicated. The authorities concluded that the applicant had consented to the catheterisation.

The applicant brought administrative proceedings against that decision which were dismissed in July 2014. During these proceedings, a medical expert opinion was commissioned which stated that there was no clear medical approach to catheterisation and no consensus on whether it was an invasive or non-invasive procedure.

In November 2011, the applicant was convicted for disorderly conduct, drink-driving and violence against police officer.

2. Decision of the Court

The applicant complained that the taking a urine sample by catheterisation amounted to inhuman and degrading treatment under Article 3 and interfered with his private life under Article 8.

Article 3

To fall within the scope of Article 3, "ill-treatment" must reach a minimum level of severity. In this case, the applicant had been physically restrained by the police to be subjected to an invasive medical procedure. Such an intervention would have given rise to feelings of insecurity, anguish and stress for the applicant. The Court concluded that the treatment had reached the minimum level of severity required and was therefore within the scope of Article 3. As such, the Government's objection of incompatibility *ratione materiae* was dismissed.

Article 3 does not prohibit the use of a medical procedure in defiance of the will of a suspect to obtain evidence of his or her involvement in a criminal offence. However, recourse to forcible medical intervention must be justified on the facts of the case. The authorities' decision should be informed by to the seriousness of the offence, any risk posed to the health of the suspect, and the availability of alternative procedures.

The parties disputed the manner in which the catheterisation was conducted and whether the applicant had consented to it. The Court first noted that there was no well-established practice nor any domestic law governing the use of catheterisation to obtain evidence of a person's involvement in an offence. Although the authorities had interviewed the persons involved, they gave preference to the version of events offered by the police officers. However, the Court doubted whether the applicant had had any option but to undergo the procedure given he was under the complete control of the police officers. Further, under domestic law he had a right to withdraw his consent at any time. He had clearly done so, as he had resisted to the point that the police officers had to pin him down to complete the procedure. As such, the applicant had not given free and informed consent throughout.

This case could be distinguished from situations where an intervention is considered to be of a minor importance given the intrusive nature of catheterisation. Moreover, although the procedure was carried out by a doctor, the

applicant had been handcuffed and restrained by the police officers throughout. While it was accepted that it was necessary to determine the blood alcohol level of the applicant, the catheterisation itself was unnecessary given that the policers officers had also obtained a blood sample.

Having had regard to the medical expert opinion commissioned in the course of the administrative proceedings, the Court considered that it had not been established that the procedure did not entail a possible risk to the applicant's health. There was no evidence to show that the police officers had considered such a risk.

In conclusion, the authorities had subjected him to a serious interference with his physical and mental integrity against his will, in order to retrieve evidence which would also be obtained by a blood sample. The manner in which the procedure had been carried out was liable to arouse in him feelings of insecurity, anguish, and stress that were capable of humiliating and debasing him. Therefore, he had been subjected to inhuman and degrading treatment. Accordingly, the Court held that there had been a violation of Article 3.

Article 8

Having concluded that there had been a violation under Article 3, the Court considered that it was not necessary to examine separately the complaint raised under Article 8.

Article 41

The Court awarded the applicant €9,000 in respect of non-pecuniary damage and €4,080 for costs and expenses.

Vaccination of applicant against diphtheria did not violate Article 8 given it was necessary to control an outbreak of the infectious disease and precautions had been taken to assess its suitability for him

51. JUDGMENT IN THE CASE OF SOLOMAKHIN v. UKRAINE

(Application no. 24429/03)
15 March 2012

1. Principal facts

The applicant was a Ukrainian national. He was born in 1964 and died in September 2010, when his mother decided to pursue the application on his behalf.

In November 1998, the applicant sought medical assistance from Donetsk City Hospital No.16, where he was diagnosed with an acute respiratory disease and prescribed out-patient treatment. Five days after this, he was vaccinated against diphtheria after showing no susceptibility to its antigens. According to the applicant, the vaccination was contraindicated for him.

From December 1998, the applicant spent more than half a year in different medical institutions, receiving treatment for a number of chronic diseases including pancreatitis, cholecystitis, hepatitis and colitis. In February 1999, the Chief Doctor of the Hospital reprimanded medical staff for vaccinating the applicant, given his previous objections and the fact he was being treated for an acute respiratory disease, also suggesting they had violated vaccination rules.

In April 1999, the applicant instituted proceedings in the Budyonnovskiy District Court against the local department of public health, seeking compensation for damage to his health. He alleged the vaccination had resulted in him suffering from chronic diseases because it had been given to him whilst he was ill. He also claimed it was of poor quality, uncertified, had expired, had been stored inappropriately, and alleged doctors tried to falsify his records to conceal the negative effects of the vaccination. In June 2003, the court found against the applicant, expert evidence demonstrating no causal link between the vaccine and the his diseases. The court noted the epidemic situation in the Donetsk region called for the vaccination, that he showed no signs of allergic reaction, had no acute symptoms of any disease upon vaccination and that no physical force had been applied, he was of sound mind and could have refused the vaccination.

Though the vaccination had not been performed in a designated room, as required by the regulations, it met all other stipulations. The allegations against the quality of the vaccine and the records were rejected as unsubstantiated. This judgment was upheld by the Supreme Court in August 2008.

2. Decision of the Court

The applicant complained the length of the proceedings were incompatible with the reasonable time requirement under Article 6 § 1. He further complained, under Article 2, that the vaccine had resulted in him suffering a number of chronic diseases, which the Court chose to examine under Article 8.

Article 6 § 1

The Court reiterated that the reasonableness of the length of the proceedings had to be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities. It noted it had frequently found violations of Article 6 § 1 in cases raising similar issues.

Although the case in question was complex and required forensic medical examination of the applicant's conditions, such complexity could not justify the length of the proceedings which exceeded nine years for three levels of jurisdiction, including almost five years before the appeal court. Having regard to its case-law on the subject, the Court considered the length of the proceedings was excessive and failed to meet the "reasonable time" requirement. Therefore, it held there was a breach of Article 6 § 1.

Article 8

The Court reiterated that previous case-law had established that compulsory vaccination amounted to an interference with the right to respect for one's private life under Article 8 and it was uncontested that there had been an interference with the applicant's private life. The administration of the vaccine was clearly provided by law and pursued the legitimate aim of the protection of health. Thus, the focus was on its necessity in a democratic society.

It stated the interference could be said to be justified by the public health considerations and necessity to control the spread of infectious diseases in the

region. Furthermore, according to the domestic court's findings, the medical staff had checked the applicant's suitability for vaccination prior to carrying it out, which suggested that necessary precautions had been taken to ensure it would not be to his detriment to the extent that would upset the balance of interests between his personal integrity and the public interest of protecting the health of the population. The applicant also failed to explain what had prevented him from objecting to the vaccination, when previously he had objected on several occasions. The Court considered there was no evidence before it to prove that the vaccination in question had actually harmed the applicant's health.

It also noted that the applicant's allegations were thoroughly examined by the domestic courts and found unsubstantiated. They found only one insignificant irregularity in the procedure: the performance of the vaccination outside the designated room. This, they found, did not in any way affect the applicant's health. They also established, on the basis of several medical expert reports, that none of the known side-effects of the vaccination were manifested by the applicant. The findings of the domestic courts were based on a large amount of medical data collected upon the motion of the applicant and of the courts. They appeared to be grounded on a sufficient evidential basis and their conclusions were not considered arbitrary or manifestly unreasonable. Furthermore, the applicant did not submit any evidence to challenge these findings of the domestic authorities.

Therefore, the Court found no violation of Article 8.

Article 41

The Court awarded the applicant's mother €2,400 in respect of non-pecuniary damage and €100 in respect of costs and expenses.

No violation of Article 8 where the State implemented compulsory vaccinations for children, and critical opinion on vaccinations does not constitute a conviction or belief of sufficient seriousness to fall under Article 9

52. GRAND CHAMBER JUDGMENT OF VAVŘIČKA AND OTHERS v. THE CZECH REPUBLIC

(Application no. 47621/13)
8 April 2021

1. Principal Facts

Mr Pavel Vavřička, Ms Markéta Novotná, Mr Pavel Hornych, Mr Radomír Dubský, Mr Adam Brožík and Mr Prokop Roleček ("the applicants") were all Czech nationals.

In the Czech Republic, the Public Health Protection Act required all permanent residents to undergo routine vaccinations in accordance with secondary legislation. For children under the age of fifteen, it was their statutory representatives who were responsible for compliance with this duty. The Public Health Protection Act also stipulated that preschool facilities could only accept children who had received the required vaccinations or who had been certified as exempt on health grounds. The Minor Offences Act applied to persons who violated a prohibition or failed to comply with a duty imposed to prevent infectious diseases, punishable by a fine.

Mr Pavel Vavřička was found guilty of an offence under the Minor Offences Act for failure to comply with an order to bring his two children to a health care facility for vaccinations against poliomyelitis, hepatitis B and tetanus. He was fined and ordered to pay costs (the equivalent of €110). The applicant challenged the decision at the administrative level and before the Constitutional Court on the basis that the duty to vaccinate his children was contrary to his fundamental rights and freedoms, in particular the right to refuse medical intervention and the right to hold and manifest religious and philosophical beliefs. The applicant's challenges were dismissed, *inter alia*, on the grounds that the interest in protecting public health outweighed the applicant's right to manifest his religion or belief.

The remaining applicants were children, whose parents had refused to have them vaccinated against poliomyelitis, hepatitis B, and other diseases. Due to

this, their admission to nursery schools had been refused or revoked pursuant to the Public Health Protection Act. The applicants challenged the decisions through administrative and Constitutional courts. Their challenges were dismissed, *inter alia*, on the ground that the vaccination duty pursued the legitimate aim of protecting public health.

2. Decision of the Court

The applicants alleged that the various consequences for them of non-compliance with the statutory duty of vaccination had been incompatible with their right to respect for their private life under Article 8 of the Convention.

Article 8

The Court framed the subject matter of the applicants' complaints as both the vaccination duty imposed on them and the consequences of their non-compliance. The Court relied on established case law to find that compulsory vaccination, as an involuntary medical intervention, represents an interference with the right to respect for private life under Article 8. Although in this case the applicants had not been vaccinated, the fact that the applicants bore the direct consequences of non-compliance with the vaccination duty meant the Court was satisfied there had been an interference with their right to respect for private life.

The Court then examined whether the interference could be justified on the grounds that it: first, was in accordance with the law; and second, pursued a legitimate aim that was necessary in a democratic society. On the first ground, the Court was satisfied that the interreference was in accordance with the law. The vaccination duty had a specific basis in the Public Health Protection Act and the consequences of non-compliance stemmed from the Minor Offences Act. On the second ground, the Court recognised that the aim of the vaccination duty was to protect against diseases which may pose a serious risk to health, both to those who received the vaccination and those that could not be vaccinated. This objective corresponded with the aims of the protection of health and the protection of the rights of others, recognised by Article 8.

In regard to whether the interference was necessary in a democratic society, the Court considered healthcare policy matters to be within the State's margin of appreciation. Domestic authorities are best placed to assess priorities, the use of resources and social needs. The Court noted that although the vaccination

duty may relate to the individual's effective enjoyment of intimate rights, the weight of this consideration was lessened by the fact that no vaccinations were administered against the will of the applicants, nor did the domestic law permit compliance with the duty to be forcibly imposed. Furthermore, there was a general consensus among Contracting Parties that vaccination is one of the most successful and cost-effective health interventions and that each State should aim for high levels of vaccination among its population.

The Court recognised that amongst Contracting Parties to the Convention, there was no single model of child vaccination. Rather, there was a spectrum of policies, which ranged from those based wholly on recommendation, those that made one or more vaccinations compulsory, through to those that made it a matter of legal duty to ensure the complete vaccination of children. The Czech Republic positioned itself at the more prescriptive end of the spectrum, a position which was supported and shared by three intervening Governments (France, Poland and Slovakia). The Court noted that there was a growing trend amongst Contracting States towards a more prescriptive approach to offset decreasing herd immunity caused by voluntary vaccination schemes.

The Court accepted that making childhood vaccinations a legal duty could raise sensitive moral or ethical issues, but that this sensitivity was not limited to those who disagree with the vaccination duty. It encompassed the value of social solidarity to protect the health of all members of society, particularly those who are especially vulnerable. Due to the above, the Court considered the State to have a wide margin of appreciation on this matter.

The Court reiterated that States are under a positive obligation under Articles 2 and 8 to take appropriate measures to protect the life and health of those within their jurisdiction. The Court considered that the vaccination duty represented the State's answer to the pressing social need to protect individual and public health against disease and to guard against any downward trend in the rate of vaccination among children. This mandatory approach to vaccination was supported by relevant and sufficient reasons. There was weighty public health rationale underlying the policy choice, notably the efficacy and safety of childhood vaccination. The Court observed that the vaccination duty concerned nine diseases against which vaccination was considered effective and safe by the scientific community and the Czech Government argued that the vaccination scheme was based on data including serological surveys which had been performed since 1960. Further, there was an obligation on States to place the best interests

of the child, and those of children as a group, at the centre of decisions affecting their health and development. Thus, where the State views voluntary vaccination as insufficient to achieve and maintain herd immunity, domestic authorities may reasonably introduce a compulsory vaccination policy to achieve the appropriate level of protection against serious diseases.

Finally, the Court considered whether the interference with the applicants' Article 8 rights was proportional in relation to the aim pursued. The Court noted that the national vaccination system allowed for exemptions in respect of children with a permanent contraindication to vaccination as well as a right to a "secular objection of conscience", which could be used to challenge a fine or refusal to admit a child to nursery. Further, while vaccination was a legal duty, the compliance with said duty was not directly imposed, for instance through forcible administration. Rather, the duty was enforced indirectly through sanctions, which the Court viewed to be relatively moderate in the form of an administrative fine. Regarding the non-admission to nursery, the Court found this consequence of non-compliance to be protective in nature, rather than punitive, since it sought to safeguard the health of young children. The Court also found that there were meaningful procedural safeguards in place for the applicants, which allowed them to bring administrative appeals and seek judicial remedies.

The applicants also complained of the effectiveness and safety of vaccinations, expressing strong concern with the potential adverse effects on health. The Court referred again to the general consensus on the vital importance of vaccines to protect against disease that may have severe effect on individual health and in the case of serious outbreaks, cause disruption to society. Regarding safety, the Court acknowledged that there was a very rare but serious risk to the health of individuals from vaccines. However, the Court found no reason to question the adequacy of the domestic system, which maintained continuous monitoring of the safety of the vaccines in use by competent authorities.

The Court proceeded to consider the intensity of the impugned interference with the applicants' enjoyment of their right to respect for private life. The Court held that the administrative fine imposed on Mr Vavřička was not excessive in the circumstances, furthermore there were no repercussions for the education of the applicant's children. For the child applicants, the Court found that the refusal or revocation of their enrolment in preschool was not disproportionate. Although the exclusion from preschool meant the loss of opportunity to acquire social and learning skills, this loss came as the direct consequence of the parental choice to

decline to comply with a legal duty which aimed to protect child health. It was not disproportionate for the State to require those for whom vaccination represents a remote risk to health to accept this universally practised protective measure, as a matter of legal duty and in the name of social solidarity, for the sake of the small number of vulnerable children who are unable to benefit from vaccination.

In concluding, the Court clarified that the relevant issue in this case was not whether a different, less prescriptive policy might have been adopted, but rather, when striking a balance, did the State remain within their wide margin of appreciation. The Court held that the State did not exceed their margin of appreciation and so the impugned measures can be regarded as being "necessary in a democratic society". Accordingly, there was no violation of Article 8.

Article 9

The applicants complained that the fine imposed on Mr Vavřička and non-admission to nursery school of the child applicants was contrary to their rights under Article 9. The applicants invoked the protection of Article 9 for their critical stance towards vaccination, in respect of their freedom of thought and conscience. The Court referred to past case law, which stated that the obligation to be vaccinated did not interfere with the freedoms protected in Article 9 and reiterated that not all opinions or convictions constitute beliefs in the sense protected by Article 9.

In addition, the Court noted the applicants had not further specified or substantiated their complaints under Article 9 beyond the domestic proceedings and found that their critical opinion on vaccination did not constitute a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9. Therefore, the Court held the complaint to be incompatible *ratione materiae* with the provisions of Article 9 within the meaning of Article 35 § 3 (a) and it was rejected in accordance with Article 35 § 4.

VII. Informed Consent

The authorities' failure to ensure proper implementation of the legislative scheme aimed at protecting patients' right to life violated Article 2

53. JUDGMENT IN THE CASE OF ALTUĞ AND OTHERS v. TURKEY

(Application no. 32086/07)
30 June 2015

1. Principal facts

The applicants were eleven Turkish nationals, born between 1947 and 1980. They were all relatives of Ms Keşoğlu who died as a result of an allergic reaction to penicillin administered by injection at a private hospital in Bursa, Turkey.

Ms Keşoğlu was admitted to a private hospital in February 2002 for stomach pains and high blood pressure. Doctors at the hospital prescribed her with ampicillin, a penicillin-based drug, which was administered to her by intravenous injection. She immediately suffered a cardiac arrest and was taken to Uludağ University hospital where she died a few days later. In March 2002, Ms Keşoğlu's relatives brought criminal proceedings against the private hospital, her doctor (S.Y.), and nurse (D.G.) for manslaughter and negligence. They claimed that they had informed the medical team of Ms Keşoğlu's penicillin allergy and that after she suffered the allergic reaction, staff at the hospital had refused to answer their questions about what was in the injection.

D.G. stated that she had been told to administer the penicillin injection by S.Y., but that after Ms Keşoğlu's allergic reaction, she saw that penicillin had been crossed out from the hand-written prescription for her. D.G. claimed that S.Y. told her to deny that she had administered penicillin and that he would type an amended prescription which did not refer to penicillin. S.Y. admitted that he had initially prescribed penicillin, but then decided not to administer it and crossed it out from the prescription, but that this amendment was ignored by the nurse.

In its report of 23 September 2002, the Institute of Forensic Medicine concluded that the cause of death was anaphylactic shock from the penicillin injection. However, the report indicated that it could not attribute liability to the medical

team given fatal allergic reactions can often result from mere re-administration of a treatment already administered or from the injection of a test dose. Similarly, the National Health Council's report of 7 January 2005 concluded that the medical team had complied with the relevant medical procedures and was not liable for Ms Keşoğlu's death. After two judgments acquitting the defendants, the court of cassation held that the criminal proceedings had become time-barred.

Civil proceedings instituted by the applicants in 2002 were dismissed on the basis of an expert report of 25 September 2003 by members of the Istanbul University Medical Faculty. The applicants unsuccessfully appealed to the Court of Cassation.

2. Decision of the Court

The applicants alleged that the medical team had not complied with its statutory obligations to consult Ms Keşoğlu and her relatives about her medical history, to inform her of any possible risks of the treatment, and to obtain her consent prior to treatment, in breach of Article 2 of the Convention. They also alleged that the remedial procedures available to them were not fair under Article 6. The Court considered all the complaints under Article 2.

Article 2

The State is under an obligation to take the necessary measures to protect the life of persons within its jurisdiction. This includes an obligation to establish an efficient and independent judicial system with the power to evaluate the legal compliance of care provided by medical professionals. Both parties agreed that in Turkey there existed a legislative scheme which imposed an obligation on private and public hospitals to inform their patients of the possible risks involved in a potential treatment and to obtain their consent. The applicants' complaint concerned whether the judicial system was capable of ensuring that the legislative scheme was adequately followed.

The Court observed that none of the judicial decisions, nor any of the reports, considered whether the medical team had consulted Ms Keşoğlu or her relatives on her allergy, whether they had informed her of the possible medical risks of the treatment, or whether her consent to the treatment was obtained. While the National Health Council's report stated that the medical team had complied with the relevant medical procedures, it did not detail the manner in which they had

done so. Further, the report from members of the Istanbul University Medical Faculty did not investigate the lack of documentation proving that the doctors had been informed of Ms Keşoğlu's allergy and therefore failed to address whether the medical team had complied with their obligations under the legislative scheme.

The Court held that these questions were important, if not decisive, to the dispute and required an explicit response from the courts. While it was not for the Court to determine the liability of the medical team if these questions were considered, the Court concluded that in failing to address these questions the authorities had failed to ensure appropriate implementation of the relevant legislative framework protecting Ms Keşoğlu's right to life.

Finally, the civil court failed to ascertain the precise chain of events preceding Ms Keşoğlu's death, despite the fact S.Y. and D.G. provided different accounts. As such, its decision could not provide a clear assessment of the case based on an established and truthful version of events. Therefore, the authorities did not provide the applicants with an effective remedy and violated the procedural aspect of Article 2.

Article 41

The Court awarded the applicants €20,000 in respect of non-pecuniary damage and €1,650 for costs and expenses.

Hormone therapy in a psychiatric hospital, allegedly administered without the patient's free consent, did not violate Article 3

54. JUDGMENT IN THE CASE OF DVOŘÁČEK v. THE CZECH REPUBLIC

(Application no. 12927/13)
6 November 2014

1. Principal facts

The applicant was a Czech national, born in 1971. In 1999, he was diagnosed with Wilson's disease, a genetic disorder linked to the accumulation of copper in the tissues, for which symptoms include liver disease and neurological and psychological problems. At the time of diagnosis, he was beginning to experience problems with his speech and mobility and was suffering from hebephilia, a form of paedophilia, for which he was prosecuted on several occasions.

In 2002, he was given a suspended prison sentence and ordered to undergo protective treatment. In August 2007, the Olomouc District Court ordered him to undergo protective sexological treatment at a hospital. He was interned at Šternberk psychiatric hospital from 13 November 2007 to 4 September 2008. The day after his admission, the head doctor noted that since he refused castration and anti-androgen treatment, his stay would likely be permanent. However, during a medical examination on 3 December 2007, he accepted the anti-androgen treatment to lower his testosterone level, which he had previously refused. The applicant was injected with anti-androgens at regular intervals between December 2007 and July 2008.

After receiving treatment in July 2008, the applicant expressed his unhappiness with the treatment and stated that he would prefer to undergo outpatient treatment. He submitted that his condition had worsened during his time at Šternberk and that he suffered mental problems due to his fears of the hospital, castration, humiliation and loss of dignity. He also submitted that the medication had impeded his sex life with his girlfriend, and that he wished to undergo psychotherapy. In light of this, the staff at Šternberk proposed to the court that his treatment be changed from internment in the hospital to outpatient treatment. After a series of medical examinations, the court accepted this request.

In 2008, the applicant brought a number of unsuccessful actions regarding the conditions of his internment at Šternberk. He complained that he had not received adequate psychotherapy, and argued that he had only consented to anti-androgen treatment because of his fear of permanent hospitalisation, as he had not been offered alternative treatment. He also complained that he had been placed under psychological pressure by the doctors to undergo castration. His tribunal claim that the conditions of internment violated his personal rights as defined in the Czech Civil Code (including for example the right to respect for private life) was dismissed. He then lodged a complaint with the police which was also dismissed on the basis that the issue had already been examined by the tribunal, where it was found that there had been no ill-treatment.

2. Decision of the Court

The applicant alleged that the conditions of his protective treatment at Šternberk, the failure to reasonably accommodate his disability, and the fact he had been subjected to forcible medical treatment amounted to torture and inhuman and degrading treatment in violation of Article 3. He also alleged that he did not have access to an effective remedy under Article 13. The Government argued that his claim for inadequate and forcible medical treatment should be examined under Article 8. As the applicant was explicitly opposed to this, the Court considered that it was obliged to examine the case exclusively under Article 3.

Article 3

To fall within the scope of Article 3, ill-treatment had to be sufficiently serious. Measures ordered as a therapeutic necessity in the opinion of established medical practice did not, in principle, amount to inhuman or degrading treatment provided that the necessity was adequately demonstrated and that the relevant procedural safeguards were respected when the decision was made.

The applicant's protective sexology treatment was intended to protect him and therefore was not a "punishment" within the meaning of Article 3. The Court went on to consider whether the conditions he had endured at Šternberk amounted to inhuman or degrading treatment. The applicant alleged that these conditions included: a bed unsuited to his needs, inability to rest in bed during the day, inability to participate regularly in outdoor activities, no personal locker, and an obligation to shower with other patients in the presence of a nurse. Nevertheless, these conditions did not meet the high threshold required to

amount to inhuman or degrading treatment. Relying above all on medical opinion, the Court considered that while the conditions had caused him discomfort, they were justified by his state of health and his behaviour. Therefore, the conditions at Šternberk did not constitute an exceptional ordeal tantamount to treatment contrary to Article 3.

The Court also examined whether Šternberk had failed to provide the applicant with appropriate psychotherapy, subjected him to forcible medicinal treatment and applied psychological pressure on him to undergo castration. The primary question was whether the applicant had consented to the anti-androgen treatment. It was noted by the Court, as well as the Czech Ombudsman and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, that the relevant legal basis in the Czech Republic at the time was vague and unclear, and could be interpreted as meaning that obtaining consent was unnecessary to administer protective treatment ordered by a court.

It was not established that the applicant had been pressured to submit to castration. However, the Court acknowledged that he had faced a difficult choice between taking the anti-androgens which would significantly reduce his dangerousness, permitting him to leave the hospital quicker, and psychotherapy and sociotherapy which would involve a longer stay. While the anti-androgen treatment had been deemed a therapeutic necessity, it was not established that he had been pressured to accept it. The doctors at Šternberk tailored the treatment to each of his reservations and had therefore not failed in their obligation to protect his health.

In its statement to the Court, Šternberk psychiatric hospital insisted that the applicant had been appropriately informed. The situation would have been clearer if the applicant had been required to sign a form which detailed the benefits and the side-effects of the treatment and his right to withdraw his consent. However, such a procedural failure was insufficient to breach Article 3. Accordingly, the Court could not establish beyond reasonable doubt that he was subjected to forcible medical treatment and held that there was no violation of the substantive aspect of Article 3.

The Court considered that the applicant's allegations concerning his ill-treatment at Šternberk were sufficiently serious to require an effective investigation by the State. However, it found that the applicant had had an opportunity to

have the actions of the hospital personnel examined by a national authority in the context of the civil proceedings brought against Šternberk for the protection of personality rights. Therefore, the State had fulfilled its obligation to conduct an effective investigation.

Finally, the police could not be reproached for referring to the results of these proceedings in its refusal to open a criminal investigation. Accordingly, the Court held that there was no violation of the procedural aspect of Article 3. In light of this conclusion, and the fact that a successful claim for protection of personal rights allowed for an award of compensation, it was unnecessary to examine the case separately under Article 13.

Lack of clarity in the law authorising the removal of tissue from the applicant's husband's body without consent violated Article 8, and her resulting anguish violated Article 3

55. JUDGMENT IN THE CASE OF ELBERTE v. LATVIA

(Application no. 61243/08)
13 January 2015

1. Principal facts

The applicant was born in 1969 and lived in Sigulda. On 19 May 2001, her husband died in a car accident. The autopsy was carried out at the Forensic Centre, where the forensic medical expert noted that there was no stamp in her husband's passport objecting to the use of his tissue and removed a 10cm by 10cm piece of ***dura matter*** from his body. The body was returned to the applicant for the funeral on 26 May 2001. This was the first she saw the body, and she noted that his legs had been tied together. The body was then buried that way.

Two years later, the security police opened a criminal inquiry into the illegal removal of organs and tissues from deceased bodies between 1994 and 2003 for supply to a German pharmaceutical company. This is when the applicant learned that her husband's tissue had been removed under a State-approved agreement and sent to this pharmaceutical company to create bio-implants. However, in December 2005, the prosecutors discontinued the inquiry accepting that the Latvian Law on the Protection of Bodies of Deceased Persons and the Use of Human Organs and Tissues ("the Law") allowed "presumed consent", meaning that "everything which was not forbidden was allowed". The investigators considered that the Law relied on "informed consent" which would require the consent of the donor or the relatives. On 13 August 2007, the applicant was informed that the criminal inquiry, as it related to the removal of tissue from her husband, was discontinued due to the expiry of the five year statutory limitation period.

The superior prosecuting authorities later established that the experts at the Forensic Centre had breached the Law as the tissue removal was unlawful and quashed the decision to discontinue the inquiry. The subsequent investigation from March 2008 discovered that between 1999 – 2002, tissue had been removed from 495 people. Despite this finding, a decision of 27 June 2008 discontinued the criminal inquiry stating that while the Law provided the closest relatives with

a right to object to the removal of organs or tissue, it did not impose a legal obligation on the experts to inform them of that right. Therefore, the Forensic Centre experts could not be convicted under the Law.

2. Decision of the Court

The applicant complained that tissue removal from her deceased husband's body without her consent was contrary to her right to respect for private and family life under Article 8 of the Convention. She also complained that this removal had left her in a state of uncertainty which had caused her emotional distress contrary to Article 3. She further alleged that she did not have access to an effective remedy under Article 13.

Article 8

The State is under a positive obligation to put in place reasonable measures to ensure adequate legal protection against arbitrary interference with an individual's right to respect for private and family life. As the closest relative to the deceased, the applicant had a right to consent to the tissue removal. Therefore, the authorities' failure to put in place practical legal conditions to enable her to express her consent interfered with her right to respect for private and family life.

In order for the interference to be lawful it must have been "in accordance with the law", meaning that the relevant domestic legislation was sufficiently clear and afforded adequate protection against arbitrariness. The disagreement between the security police and the supervising prosecutors as to the scope of the applicable law indicated that it lacked sufficient clarity. By the time the security police agreed with the prosecutors' interpretation that "informed consent" was required, the possibility of a criminal action was time-barred. Although Latvian law had a legal framework by which relatives could consent to tissue removal, it did not clearly define the scope of the corresponding obligations and discretion available to experts or other authorities.

As to adequate protection against arbitrariness, the Court noted that the relevant European and international documents on tissue removal placed a particular emphasis on establishing the views of relatives through reasonable enquiry. Given the large number of people from whom tissue had been removed, it was important to put in place adequate measures to balance the relatives' interests and the discretion of the experts who carried out the removals. As this

was not done, the applicant did not know how to exercise her right to consent to the removal of tissue from her husband's body. Therefore, the interference with her right to respect for her private life was not "in accordance with the law". Accordingly, the Court held that there was a violation of Article 8.

Article 3

Respect for human dignity forms part of the very essence of the Convention. In order to find a separate violation of Article 3 in respect of the victim's relatives, there must exist special factors which cause suffering beyond the grief that follows from the death of a close family member.

The applicant had endured emotional suffering as she had only learned about the tissue removal two years after her husband's funeral and the criminality of such acts were only exposed a further five years later. Moreover, she had only discovered which tissue had been removed from her husband's body over the course of the Government's submissions before the Court. As such, she had faced a long period of uncertainty, anguish, and distress over why her husband's legs had been tied together when his body was returned from the autopsy. To add to her distress, the criminal inquiry had established that tissue had been removed from hundreds of persons over a period of nine years, some of which were carried out under State-approved agreements with a German pharmaceutical company. She had also been denied any redress for a breach of her personal right to consent to the removal of tissue from her husband's body. These were special factors that caused additional suffering for the applicant, beyond that of a grieving widow.

In the field of organ and tissue transplantation, it was recognised that the human body must still be treated with respect even after death. In fact, the object of international treaties such as the Convention on Human Rights and Biomedicine and the Additional Protocols were to protect the dignity, identity, and integrity of "everyone" who has been born, whether living or dead. There was no doubt that the applicant's suffering over the removal of tissue from her husband's body amounted to degrading treatment. In conclusion, the Court held that there had been a violation of Article 3.

Article 41

The Court awarded the applicant €16,000 in respect of non-pecuniary damage and €500 for costs and expenses.

VIII. Storage of data including tracking

Disclosure of Jehovah's Witnesses' medical files following their refusal of blood transfusions breached their right to respect for private life, violating Article 8

56. JUDGMENT IN THE CASE OF AVILKINA AND OTHERS v. RUSSIA

(Application no. 1585/09)
6 June 2013

1. Principal facts

The four applicants were: a religious organisation, The Administrative Centre of Jehovah's Witnesses in Russia based in St Petersburg, and three Russian nationals who were Jehovah's Witnesses.

In September 2004, the Committee for the Salvation of Youth from Destructive Cults ("the Committee") wrote to the Russian President, accusing the applicant organisation of extremism and requesting an inquiry into its activities. This was forwarded to the Prosecutor's Office, and an ensuing enquiry found no violations. The Committee subsequently lodged six further complaints, all of which were rejected following an inquiry. The applicant organisation requested disclosure of the inquiry results, but this was refused. In June 2007, in connection to investigating the lawfulness of the applicant organisation's activity, the prosecution authorities instructed all St. Petersburg medical institutions to report refusals of blood transfusions by Jehovah's Witnesses.

On an unspecific date and from February 2006, the second and the fourth applicant underwent chemotherapy and surgical treatment respectively. Both followed non-blood management treatment plans and, in line with the above, their medical records were shared with State authorities.

In March 2007 the third applicant was admitted to a public hospital, where she requested non-blood management treatment, which the hospital did not agree to provide. She was discharged and her medical records were not shared with State authorities.

Subsequent court proceedings in the domestic courts, culminating in a judgment on 27 March 2008, found the disclosure of the applicants' medical data to have been lawful.

2. Decision of the Court

The second, third and fourth applicants complained that the disclosure of their medical files to the Russian prosecution authorities as a consequence of their refusal of blood transfusions violated Article 8 and that, as a result, all four applicants argued the individual applicants had been discriminated against under Article 14.

Article 8

The complaint brought by the third applicant was declared inadmissible as no disclosure of her medical files had actually taken place, which was not in dispute by the parties.

The Court was in no doubt that the disclosure of the second and fourth applicants' medical files constituted an interference with their right to respect for their private life, the issue being whether that interference was justified.

It accepted that the impugned measure had a basis in domestic law, though noted the applicants' argument that the general wording might have been open to extensive interpretation. It considered this, and the question of a legitimate aim, to be closely related to the broader issue of whether the interference was necessary in a democratic society. In determining this, the Court noted from the outset that the crucial issue was the protection of personal data. The applicants' rights to personal autonomy in the sphere of physical integrity and religious beliefs, examined at length in earlier cases, were not at issue in this case.

The Court reiterated that respecting the confidentiality of health data is crucial, not only for the protection of a patients' privacy, but also for the maintenance of confidence in health services in general. Without such protection, those in need of medical assistance may be deterred from seeking appropriate treatment, endangering their own health. Nevertheless, the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest of investigating and prosecuting crime and in the publicity of court proceedings, where such interests are shown to be of even

greater importance. It was recognised that national authorities had a margin of appreciation in striking this fair balance, though this was subject to the Court's supervision.

It found there had been no pressing social need to disclose confidential medical information of the second and fourth applicants. In particular, the hospitals where they were treated had not reported any alleged criminal behaviour on either applicant's behalf. Moreover, the medical staff could have requested judicial authorisation for the second applicant, two years old at the time, to have a blood transfusion if they had believed her to have been in a life-threatening situation; and, the doctors who reported on the fourth applicant did not suggest that her refusal to have a blood transfusion was the result of pressure from other Jehovah's Witnesses. The means employed by the prosecutor in conducting the inquiry, involving disclosure of confidential information without any prior warning or opportunity to object, did not need to have been so oppressive. It was also noted there were additional options, other than ordering the disclosure of confidential medical information, available to the prosecutor to follow up on the complaints lodged with his office. In particular, he could have tried to obtain the applicants' consent for the disclosure and/or questioned them in relation to the matter.

Therefore, the authorities had made no effort to strike a fair balance between, on the one hand, the applicants' right to respect for their private life and, on the other, the prosecutor's aim of protecting public health. Nor indeed did they provide any relevant or sufficient reasons to justify the disclosure of such confidential information. Therefore, the Court held there was a violation of Article 8.

Article 14 in conjunction with Article 8

Given the above finding, it considered there was no need to examine the applicants' complaints from the standpoint of Article 14.

Article 41

The Court awarded €5,000 each to the second and fourth applicants in respect of non-pecuniary damages, and €2,522 to the second and €1,880 to the fourth applicant for costs and expenses.

Domestic law's lack of precision in permitting disclosure of the applicant's medical data to a public authority was not "in accordance with law", violating Article 8

57. JUDGMENT IN THE CASE OF L.H. v. LATVIA

(Application no. 52019/07)
29 April 2014

1. Principal facts

The applicant was a Latvian national, born in 1975. At the relevant time, the Inspectorate of Quality Control for Medical Care and Fitness for Work ("the MADEKKI") was responsible for monitoring the quality of medical care provided in medical institutions.

While the applicant was giving birth in 1997, a Caesarean section was used with her consent. During that surgery, a tubal ligation was performed without her consent, resulting in sterilisation. Following an unsuccessful attempt to achieve an out-of-court settlement, she brought civil proceedings against the hospital in February 2005 and, in December 2006, was awarded compensation for the unauthorised sterilisation.

In the meantime, in February 2004, the MADEKKI, on request from the district hospital's director, initiated an administrative inquiry concerning the gynaecological and childbirth assistance provided to the applicant from 1996 to 2003. In April 2004, a MADEKKI staff member telephoned the applicant, informing her of the inquiry and inviting her to comment on the case, which she refused to do. The MADEKKI received her medical files from three medical institutions and, in May 2004, issued a report containing the applicant's sensitive medical details. A summary of its conclusions was also sent to the hospital director.

The applicant lodged a claim before the administrative courts, complaining that the inquiry had been unlawful, since its essential purpose had been to help the hospital to gather evidence for the impending litigation, which was outside the MADEKKI's remit. It was also alleged that MADEKKI had acted unlawfully in requesting and receiving information about the applicant's health. The applicant also requested the MADEKKI's report be annulled. Her claim was rejected by the Administrative District Court in a decision eventually upheld by the Senate of the Supreme Court ("the Senate") in February 2007. The Senate concluded the

MADEKKI was authorised to collect and process the applicant's sensitive data in order to monitor the quality of medical care, and that the Personal Data Protection Law permitted the processing of sensitive personal data without written consent from the data subject for the purposes of medical treatment or the provision or administration of health care services.

2. Decision of the Court

The applicant complained that the MADEKKI, by collecting her personal medical data, had violated her right to respect for her private life under Article 8.

Article 8

It was not disputed that the applicant's medical data formed part of her private life, and the collection of this data by the MADEKKI constituted an interference with her right to respect for her private life. The question before the Court was whether the interference was justified as being "in accordance with the law", re-iterating this necessitated compliance with domestic law and reasonable clarity regarding the scope and manner of the relevant discretion conferred on public authorities.

The Court accepted that the MADEKKI was authorised to collect information from medical institutions relating to questions within its field of competence, though it noted the legal norms which described this competence were very general in fashion.

It also noted that the MADEKKI started to collect the applicant's medical data in 2004, seven years after her sterilisation and at a time when the applicant was involved in civil litigation with the hospital. In the Court's view, this lengthy delay raised a number of questions, namely, whether data collection in 2004 could be deemed to have been "necessary for the purposes of medical treatment [or] the provision or administration of heath care services" within the meaning of the relevant section of the Data Protection Law, if the actual health care services had been provided seven years earlier. In this context, it was noted the applicant had never been informed that the MADEKKI had collected and processed her personal data in order to carry out a general control of the quality of health care provided by the hospital. The hospital itself was never given any recommendations on how to improve the services provided by it.

The Senate had not explained which of its functions the MADEKKI had been carrying out or what public interest it had been pursuing when it issued a report on the legality of the applicant's treatment. Accordingly, the Senate had not and could not have examined the proportionality of the interference with the applicant's right to respect for her private life against any public interest, particularly since it came to the conclusion that such weighing had already been done by the legislator. This had taken place against the background of domestic law, under which the MADEKKI was under no legal obligation to take decisions concerning the processing of medical data in such a way as to take the data subject's view into account, or even to inform the data subject that it would be processing the data prior to doing so.

The Government's suggestion, that the MADEKKI had collected information concerning the applicant's medical history in order to determine whether the doctor who had performed the tubal litigation should be held criminally liable, could not be accepted. Firstly, seven years after the event the prosecution had certainly become time-barred. Secondly, neither the director of the hospital nor the MADEKKI had the legal authority to determine, even on a preliminary basis, the criminal liability of private individuals.

Furthermore, the applicable law did not limit in any way the scope of private data that could be collected by the MADEKKI. In the present case, the MADEKKI collected the applicant's medical data concerning a period spanning seven years. The relevance and sufficiency of the reasons for collecting information about the applicant that was not directly related to the procedure carried out at the hospital, had not been examined at any stage of the domestic procedure.

Therefore, the applicable Latvian law was not formulated with sufficient precision and did not afford adequate legal protection against arbitrariness, neither did it indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. The interference with the applicant's right to respect for her private life was thus not in "accordance with the law" within the meaning of Article 8 § 2, violating Article 8.

Article 41

The Court awarded the applicant €11,000 in respect of non-pecuniary damage, and €2,768 in respect of costs and expenses.

Unlawful disclosure of pregnant applicant's medical information to her employer without her consent violated Article 8

58. JUDGMENT IN THE CASE OF RADU v. REPUBLIC OF MOLDOVA

(Application no. 50073/07)
15 April 2014

1. Principal facts

At the time of the events, the applicant was thirty-four years old, married and a lecturer at the Police Academy. It appeared from the case-file materials that the relationship between the applicant and her superiors at the Police Academy were tense and there had been a set of employment-related civil proceedings between them.

In 2003, the applicant became pregnant with twins through artificial insemination. Due to her increased risk of miscarriage, a doctor at the No. 7 Centre for Family Doctors ("the CFD"), a state-owned hospital, ordered her hospitalisation, and she stayed in hospital for 17 days. It appeared that the applicant's absence from work during her hospitalisation was certified by a sick note referring to her pregnancy and an increased risk of miscarriage as the reasons for her absence.

In November 2003, the President of the Police Academy requested more information from the CFD about her medical leave. The CFD then provided information, without the applicant's consent, which included details about her pregnancy, artificial insemination process and medical procedures. They also included a copy of her medical file.

Two days after the disclosure, the applicant suffered a miscarriage that she attributed to the stress the disclosure had caused. According to the applicant, the information had been disclosed to everybody at the Police Academy, resulting in rumours spreading, and her students learning about her private life. Her husband, who had also been an employee of the Police Academy, had to resign from his post and accept a less well-paid job.

In January 2004, the applicant initiated civil proceedings against the CFD and Police Academy at the Centru District Court. These were dismissed on the grounds, inter alia, that the disclosure of information by the fertility clinic had been lawful in view of the ongoing investigation being conducted by the Police Academy. This was upheld by the Supreme Court of Justice in May 2007.

2. Decision of the Court

The applicant complained that the disclosure of her medical information by the CFD to her employer constituted a violation of her right to respect for private life under Article 8. She also alleged, under Article 6, that the proceedings she instigated against the CFD were unfair because the courts adopted arbitrary decisions which they failed to justify.

Article 8

It was undisputed between the parties, and the Court agreed, that the disclosure by the CFD to the applicant's employer of such sensitive details constituted an interference with her right to private life. The Court then moved on to consider whether the disclosure was "in accordance with the law", noting this necessitated compliance with domestic law and reasonable clarity regarding the scope and manner of the relevant discretion conferred on public authorities.

In their submissions, the Government referred to section 8 of Law 982 on access to information as being the legal basis for the interference. The Court noted, firstly, that it was only the Government and not the Supreme Court that referred to such legal basis for the interference. In fact, the Supreme Court merely stated that the CFD was entitled to disclose the information to the applicant's employer, without citing any legal basis for such disclosure. Secondly, even assuming that the Supreme Court had intended to rely on that provision, it was noted that under section 8, a doctor would not be entitled to disclose information of a personal nature, even to the applicant's employer, without her consent.

It was further noted that the relevant domestic and international law at the Court's disposal expressly prohibited disclosure of such information to the point that it even constituted a criminal offence. Though there are exceptions to the rule of nondisclosure, none of them seemed applicable in applicant's situation. Indeed, the Government did not show that any such exceptions were applicable. It followed that the interference was not "in accordance with the law".

Accordingly, there was no need to examine whether it pursued a legitimate aim or was "necessary in a democratic society".

The Court therefore found there had been a violation of Article 8.

Article 6

In view of the conclusion above, the Court held that no separate issue arose under Article 6.

Article 41

The Court held the Government was to pay the applicant €4,500 in respect of non-pecuniary damage and €1,440 in respect of costs and expenses.

Violation of Article 8 held where State secret surveillance of mobile telephone communications did not have a legal framework that provided for adequate and effective guarantees against arbitrariness and abuse

59. GRAND CHAMBER JUDGMENT IN THE CASE OF ROMAN ZAKHAROV v. RUSSIA

(Application no. 47143/06)
4 December 2015

1. Principal facts

The applicant, Roman Zakharov, was a Russian national, born in 1977, and the editor-in-chief of a publishing company. He subscribed to the services of several mobile network operators.

In December 2003 he brought judicial proceedings against three mobile network operators, complaining about an interference with his right to privacy of his telephone communications. He maintained that, under the relevant national law – specifically pursuant to Order no. 70 issued by the Ministry of Communications – the mobile operators had installed equipment that allowed unrestricted interception of all telephone communications by the security services without prior judicial authorisation. He asked the District Court in charge to remove the equipment installed under Order no. 70, which had never been published, and to ensure that access to telecommunications was given to authorised persons only. In December 2005 the District Court of St Petersburg dismissed Mr Zakharov's claims, finding that the installation of the equipment did not in itself infringe the privacy of his communications, and that the applicant had failed to prove that his telephone conversations had been intercepted.

The applicant appealed. He claimed that the District Court had refused to accept several documents in evidence, including judicial orders authorising the interception of several people's mobile telephone communications, which, in the applicant's opinion, proved that the mobile network operators and law-enforcement agencies were technically capable of intercepting all telephone communications without obtaining prior judicial authorisation. In April 2006 the St Petersburg City Court upheld the judgment on appeal, confirming the District Court's decision.

2. Decision of the Court

Relying on Article 8 of the European Convention on Human Rights, Mr Zakharov complained about the system of covert interception of mobile telephone communications in Russia, arguing that the relevant national law permitted the security services to intercept any person's communications without obtaining prior judicial authorisation. Relying on Article 13, he further complained he had no effective legal remedy at national level to challenge that legislation.

Article 8

The Court observed that, although the Convention does not provide for the institution of an *actio popularis*, Mr Zakharov was entitled to claim to be a victim of a violation of the Convention, even though he claimed that there had been an interference with his rights as a result of the mere existence of legislation permitting secret surveillance measures, and was unable to allege that he had been the subject of a concrete measure of surveillance. Given the secret nature of the surveillance measures provided for by the legislation, their broad scope – affecting all users of mobile telephone communications – and the lack of effective means to challenge them at national level, the Court considered an examination of the relevant legislation *in abstracto* to be justified. In view of the above, the Court considered that Mr Zakharov did not need to demonstrate that he was at risk of having his communications intercepted, as the mere existence of the contested legislation amounted in itself to an interference with his rights under Article 8.

Once determined that interception of mobile telephone communications had a basis in Russian law – namely the OSAA, the CCrP, and Order no. 70 issued by the Ministry of Communications – which pursued the legitimate aim of the protection of national security and public safety, the Court had to ascertain whether that domestic law was accessible and contained adequate and effective safeguards and guarantees.

Accessibility of domestic law

The Court found regrettable that the addendums to Order no. 70 had never been published in a generally accessible official publication. However, considering that it had been published in an official ministerial magazine, and that it could be accessed by the general public through a privately-maintained Internet legal

database, the Court did not find it necessary to pursue further the issue of the accessibility of domestic law.

Scope of application of secret surveillance measures

The Court considered that Russian legislation sufficiently clarified the nature of the offences which might give rise to an interception order. At the same time it noted with concern that the law lacked clarity concerning some of the categories of people liable to have their telephones intercepted, namely a person who could have information about an offence, or relevant to a criminal case, or those involved in activities endangering Russia's national, military, economic or ecological security. To that regard, the OSAA gave the authorities an almost unlimited degree of discretion in determining what constituted such a threat, and whether that threat was serious enough to justify secret surveillance.

The duration of secret surveillance measures

Russian law contained clear rules on the duration and renewal of interceptions providing adequate safeguards against abuse. Nevertheless, the Court noted that the requirement to discontinue interception when no longer necessary was mentioned in the CCrP only, and not in the OSAA. It followed that interceptions in the framework of criminal proceedings had more safeguards than those in connection with activities endangering Russia's national, military, economic or ecological security.

Procedures for storing, using, communicating and destroying the intercepted data

The Court was satisfied that Russian law contained clear rules governing the storage, use and communication of intercepted data, making it possible to minimise the risk of unauthorised access or disclosure.

As regards the destruction of such material, the Court found that Russian law was not sufficiently clear, as it permitted automatic storage for six months of irrelevant data in cases where the person concerned had not been charged with a criminal offence, and in cases where the person had been charged with a criminal offence it was not clear as to the circumstances in which the intercept material would be stored and destroyed after the end of the trial.

Authorisation of interceptions

The Court noted that Russian law contained an important safeguard against arbitrary or indiscriminate secret surveillance, dictating that any interception had to be authorised by a court. The law-enforcement agency seeking authorisation for interception had to submit a reasoned request to that effect to a judge, and the judge had to give reasons for the decision authorising interception.

As regards the scope of the review, judicial scrutiny was limited, and despite the recommendations of the Constitutional Court, judges did not verify the existence of a "reasonable suspicion" against the person for whom interception had been requested or examine whether interception was necessary and justified. As a result, interception requests were often not accompanied by any supporting materials, judges never requested the interception agency to submit such materials, and a mere reference to the existence of information about criminal offence or activities endangering national, military, economic or ecological security was considered to be sufficient for the authorisation to be granted.

With respect to the content of the interception authorisation, the Court observed that, unlike the CCrP, the OOSA granted a very wide discretion to the law enforcement authorities. The OOSA did not contain requirements neither with regard to the content of the request for interception nor to the content of the interception authorisation, meaning that courts sometimes granted interception authorisations which did not mention a specific person or telephone number to be tapped, but authorised interception of all telephone communications in the area where a criminal offence had allegedly been committed, and on occasions without mentioning the duration for which interception was authorised. Moreover, the non-judicial "urgent procedure" provided by the OOSA – under which it was possible to intercept communications without prior judicial authorisation for up to forty-eight hours – lacked sufficient safeguards to ensure that it was used only in duly justified cases. The authorisation procedures provided for by Russian law were not capable of ensuring that secret surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration.

Furthermore, the Court considered that a system, such as the Russian one, which enabled the secret services and the police to intercept directly the communications of each and every citizen without requiring an interception authorisation to the communications service provider was particularly prone to abuse. The need for safeguards against arbitrariness appeared therefore to be particularly great.

Supervision of the implementation of secret surveillance measures

The Court examined whether supervision of interception complied with the requirements under the Convention that supervisory bodies be independent, open to public scrutiny and vested with sufficient powers and competence to exercise effective and continuous control.

Firstly, the Court noted the that prohibition on logging or recording interceptions set out in Russian law made it impossible for the supervising authority to discover interceptions carried out without proper judicial authorisation. Combined with the law-enforcement authorities' technical ability to intercept directly all communications, this law rendered any supervision arrangements incapable of detecting unlawful interceptions, and therefore ineffective.

Secondly, supervision of interceptions carried out on the basis of proper judicial authorisations was entrusted to the President, Parliament, and the Government, who were given no indication under Russian law as to how they could supervise interceptions, as well as the competent prosecutors, whose manner of appointment and blending of functions, with the same prosecutor's office giving approval to requests for interceptions and then supervising their implementation, could raise doubts as to their independence. Furthermore, the prosecutors' powers and competences were very limited, supervision conducted by them was not open to public scrutiny, and their brief semi-annual reports on operational search measures were confidential documents, not published or otherwise accessible to the public.

Lastly, the Court considered that the prosecutors' supervision of interceptions was not capable of providing adequate and effective guarantees against abuse. To that regard, Mr Zakharov had submitted documents illustrating prosecutors' inability to obtain access to classified materials on interception, whereas the Government had not submitted any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach in law.

Notification of interception of communications and available remedies

The issue of notification of interception of communications was inextricably linked to the effectiveness of remedies before the courts. The Court observed that in Russia persons whose communications had been intercepted were not notified of this fact at any point – unless that information became known as a result of

its use in evidence in eventual criminal proceedings – and that the possibility to obtain information about interceptions was particularly ineffective.

A remedy was available only to persons who were in possession of information about the interception of their communications. The effectiveness of the remedy in question was therefore undermined by the absence of a requirement to notify the subject of interception, or an adequate possibility to request and obtain information about interceptions from the authorities. Accordingly, Russian law did not provide for an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject. Also, Russian law did not provide for effective remedies to a person who suspected that he or she had been subjected to secret surveillance. By depriving the subject of interception of the effective possibility of challenging interceptions retrospectively, Russian law thus eschewed an important safeguard against the improper use of secret surveillance measures.

Conclusion

The Court concluded that Russian legal provisions governing interceptions of communications did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse. The shortcomings in the legal framework as identified by the Court indicated the existence of arbitrary and abusive surveillance practices, hence the Russian law did not meet the "quality of law" requirement and was incapable of keeping the interception of communications to what was "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention.

Article 13

Having regard to the findings under Article 8 it was not necessary to examine the complaint under Article 13 separately.

Article 41

The Court ruled that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. It further held that Russia was to pay him the sum of €40,000 in respect of costs and expenses.

Retention of fingerprints and DNA profiles by the authorities constituted a violation of Article 8

60. GRAND CHAMBER JUDGMENT IN THE CASE OF S. AND MARPER v. THE UNITED KINGDOM

(Application nos. 30562/04 and 30566/04)
4 December 2008

1. Principal facts

The applicants, S. and Michael Marper, were born in 1989 and 1963 respectively and lived in the United Kingdom.

On 19 January 2001 S. was arrested and charged with attempted robbery, aged eleven at the time. His fingerprints and DNA samples were taken. He was acquitted on 14 June 2001. Mr Marper was arrested on 13 March 2001 and charged with harassment of his partner. His fingerprints and DNA samples were taken. On 14 June 2001, the case was formally discontinued as he and his partner had become reconciled.

Once the proceedings had been terminated, both applicants unsuccessfully requested that their fingerprints, DNA samples and profiles be destroyed. The information had been stored on the basis of a law authorising its retention without limit of time.

2. Decision of the Court

The applicants complained under Articles 8 and 14 of the Convention about the retention by the authorities of their fingerprints, cellular samples and DNA profiles after their acquittal or discharge.

Article 8

The Court considered that cellular samples and DNA profiles, as well as the fingerprints, contained sensitive personal information and that their retention amounted to an interference with the applicants' right to respect for their private lives, within the meaning of Article 8 § 1 of the Convention. The Court also noted that the retention of the applicants' fingerprint, biological samples and DNA

profiles had a clear basis in the domestic law under the 1984 Act, and that it pursued a legitimate purpose, namely the detection, and therefore, prevention of crime.

The Court indicated that the domestic law had to afford appropriate safeguards to prevent any such use of personal data as could be inconsistent with the guarantees of Article 8. Further, the need for such safeguards was all the greater where the protection of personal data undergoing automatic processing was concerned, not least when such data were used for police purposes.

The issue to be considered by the Court in this case was whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was necessary in a democratic society.

The Court took due account of the core principles of the relevant instruments of the Council of Europe and the law and practice of the other Contracting States, according to which retention of data was to be proportionate in relation to the purpose of collection and limited in time.

The United Kingdom appeared at the time to be the only jurisdiction within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence. The data in question could be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; the retention was not time-limited; and there existed only limited possibilities for an acquitted individual to have the data removed from the nationwide database or to have the materials destroyed.

The Court expressed a particular concern at the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who had not been convicted of any offence and were entitled to the presumption of innocence, were treated in the same way as convicted persons. The retention of unconvicted persons' data could be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society.

In conclusion, the Court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of

persons suspected but not convicted of offences, as applied in the case of the present applicants, failed to strike a fair balance between the competing public and private interests, and that the respondent State had overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention in question constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society. The Court concluded that there had been a violation of Article 8 in this case.

Article 14 in conjunction with Article 8

In the light of the reasoning that led to its conclusion under Article 8 above, it was not necessary to examine separately the complaint under Article 14.

Article 41

The Court considered that the finding of a violation, with the consequences that this would have for the future, could be regarded as constituting sufficient just satisfaction in respect of the non-pecuniary damage sustained by the applicants. The Court awarded the applicants €42,000 in respect of costs and expenses, less the amount already paid to them in legal aid.

Article 46

The Court noted that, in accordance with Article 46 of the Convention, it would be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life.

The collection and dissemination of the medical records of the applicant and her children by a public authority to other authorities, without the applicant's consent, violated Article 8

61. JUDGMENT IN THE CASE OF Y.Y. v. RUSSIA

(Application no. 40378/06)
23 February 2016

1. Principal facts

The applicant, Ms Y.Y., was a Russian national born in 1966 and living in St Petersburg. In April 2003, she gave birth prematurely to twins at a maternity hospital in St. Petersburg ("the maternity hospital"). Her baby daughter died nine hours after birth, but her baby son survived after being transferred to the resuscitation and intensive therapy unit at a children's hospital twenty hours after birth. The applicant was of the opinion her daughter would also have survived had she been promptly transferred to a resuscitation and intensive therapy unit.

From May to August 2003, the applicant's mother sent three telegrams to the President of the Russian Federation. She complained her granddaughter did not receive adequate emergency treatment due to long waiting lists and transfer delays, and asked the government to investigate the case.

These telegrams were forwarded to the Ministry of Healthcare of the Russian Federation ("the Ministry"). The Ministry asked the Committee for Healthcare at the St Petersburg City Administration ("the Committee") to examine the allegations and take action. The Committee requested a panel of experts to investigate the case using both the applicant's and twins' medical records, which were sourced from the maternity and children's hospitals. The investigatory report concluded the baby daughter had been provided with treatment appropriate to her condition, given its seriousness. It noted such cases had an 80% risk of death and an earlier transfer did not guarantee survival. In September 2003, the report was sent to the Ministry and a letter outlining the report's conclusions sent to the applicant's mother. In December 2003, the applicant received a similar letter to that of her mother.

In February 2005, the applicant brought proceedings against the Committee, seeking a declaration it had acted unlawfully when it collected and examined her

medical records and those of her children, and communicated the report to the Ministry without obtaining her consent. The applicant also requested the report be declared invalid. In December 2005, the Kuybyshevskiy District Court of St Petersburg dismissed her application, and, in March 2006, the St Petersburg City Court further dismissed her appeal.

2. Decision of the Court

The applicant complained her rights under Article 8 (right to respect for a private and family life, home and correspondence) were violated by the Committee collecting and examining her and her children's medical records and forwarding the results of this examination to the Ministry without her consent.

Article 8

The Court noted that it was accepted by both parties that the initial series of telegrams, which prompted the Committee collecting, investigating and disseminating the medical records of the applicant and her children, originated from the applicant's mother and not the applicant herself. At no stage was the applicant's consent sought or received. Moreover, the applicant maintained her medical records contained personal and sensitive data, including the number of her pregnancies that had not resulted in deliveries. The Court had previously found that disclosure of medical records, containing personal and sensitive data, without a patient's consent constituted an interference with the patient's right to respect for private life. Though the government maintained the applicant had lodged similar complaints to those of her mother, the Court noted this was neither established in the domestic civil proceedings nor supported by any evidence.

Therefore, the Court held that the actions in dispute were an interference with the applicant's right to respect for private life as guaranteed by Article 8 § 1.

The Court then considered whether the interference was justified. It observed that to be "in accordance with the law", the impugned measure should have a basis in domestic law and be compatible with the rule of law. That is, the law should be accessible and foreseeable to enable individuals to regulate their conduct. Domestic courts must also undertake a meaningful review of the authorities' actions affecting Convention rights. It was reiterated that the clarification and interpretation of domestic law should be conducted primarily by domestic authorities, however it was within the Court's function to review this reasoning.

In the present case the Court firstly noted that the Committee did not rely on any domestic law provisions in carrying out the actions in dispute. Though domestic law contained an exhaustive list of exceptions to the general rule of non-disclosure, the courts did not rely on any of these in making their findings. Secondly, the Court disagreed with the domestic courts' claim that the Committee was duty bound to provide confidential information to the Ministry, as the courts failed to refer to any domestic law provisions on which this finding could have been based. Even assuming they intended to rely on a number of provisions relating to the general powers of the Ministry and Committee, these included no specific rules concerning the confidentiality of medical data. Therefore, it was concluded that, despite having the formal option to seek judicial review, the applicant did not possess a minimum degree of protection against arbitrariness and the disputed actions did not constitute a foreseeable application of the relevant Russian law.

Therefore, the Court held the interference with the applicant's right to respect for private life was not in accordance with the law within the meaning of Article 8 § 2, meaning it was not required to determine whether this interference pursued a legitimate aim. It was held there was a violation of Article 8.

Article 41

The Court awarded €5,000 to the applicant in respect of non-pecuniary damages, and €1,425 for legal costs and expenses.

IX. Family life

Denial of contact between the applicant and his adopted daughter during her removal, hospital stay and time in foster care due to lack of consent for her medical treatment violated Article 8, except for the period when it was proportionate due to an influenza quarantine

62. JUDGMENT IN THE CASE OF KUIMOV v. RUSSIA

(Application no. 32147/04)
8 January 2009

1. Principal facts

The applicant was a Russian national born in 1958. In May 2000, he and his spouse adopted a girl who was born in 1997.

In October 2003, the parents contacted the Kirov Regional Children's Hospital ("the hospital") about their child's deteriorating eyesight, paleness of skin, vomiting, poor appetite and limpness. During the subsequent month, she was diagnosed with acute encephalomyelitis and, despite the doctor's recommendations, the applicant and his spouse refused to consent to her hospitalisation. She was nevertheless placed in hospital for treatment and her mother stayed with her.

Across late October and early November 2003, the hospital repeatedly told the parents that the child needed to be moved to intensive care, which they objected to. The applicant alleged that in November 2003, a hospital employee and a man claiming to be a psychotherapist questioned his wife. It appeared she had impeded medical staff from carrying out emergency medical measures on her child, potentially putting her child's life at serious risk. These actions raised suspicions as to her psychological state and the interview was considered justified to protect the child's life. It concluded she "was not in need of psychiatric treatment".

In November 2003 the hospital's management informed the parents of its decision to place the child in an intensive care unit and separate her from her mother. It warned them that, if the mother refused to leave the hospital, they would contact the local Custody and Guardianship Agency ("the Agency") for assistance.

The following day, the applicant complained to the Kirov Regional Health Department of interference with his private life. and the psychotherapist's visit. He also queried the need for his daughter to be placed in intensive care. This was dismissed approximately one month later.

On 11 December 2003, the hospital's head physician, an officer ("the officer") from the Agency, and a police officer asked the applicant and his wife to place their child in the intensive care unit. When they refused, the officer handed them an order to have their child removed. The applicant subsequently brought a court action challenging the order, which was dismissed by the District Court in February 2004. The applicant appealed, but this was dismissed in April 2004.

It appeared that, after the child's removal and throughout 2004, the applicant and his wife attempted to visit her on many occasions in order to hand over food and toys, but the hospital authorities and local authority refused such contact without giving any reasons. In June 2004 the parents unsuccessfully lodged applications for a court injunction against the hospital and the local authority, preventing them from interfering with their right to communicate with the child and participate in her upbringing.

In November 2004 the Prosecutor of the Pervomayskiy District Court of Kirov successfully applied to a court for revocation of the child's adoption which the applicant appealed. It was noted the applicant had adopted three other children, one of whom died from a similar disease and another who was also the subject of a revocation order following refusal of medical treatment. In December 2004, the Kirov Regional Court quashed the decision to revoke the adoption but upheld the decision to transfer custody of the child to the Agency. Following this, proceedings concerning contact were resumed. The court ordered the administration and the hospital not to interfere with the parents' right to communicate with their child and participate in her upbringing. The former's appeal was dismissed in January 2005.

From 25 January 2005, the foster home's management refused the applicant access to the child on the ground that an influenza quarantine had been introduced. However, they were able to speak on the phone and see each other through a window. When the quarantine was lifted on 24 March 2005, the applicant was immediately allowed in-person contact on a regular basis.

On 13 October 2005 the Pervomayskiy District Court held the child could be returned to her parents, which she was on 2 November 2005.

2. Decision of the Court

The applicant complained, relying on Article 8, that the authorities had denied him access to his child following her removal, during her stay in hospital and while she was in foster care.

Article 8

The Court reiterated that the mutual enjoyment by parent and child of each other's company is a fundamental element of family life and that this relationship is not terminated by the fact a child is taken into care. Therefore, the Court found the restrictions to the applicant's access to his child between 11 December 2003 (when she was removed for medical treatment) and 2 November 2005 (when she was returned to the applicant and his wife) amounted to an interference with his right to respect for family life.

The Court then turned to whether the measure in question was "in accordance with the law". It reiterated that its power to review compliance with domestic law is limited and that it is primarily for the national authorities to interpret and apply that law. It observed that the restrictions on access to the child were examined by the domestic courts and that nothing in their judgments suggested that they were contrary to Russian law. The interference at issue was thus "in accordance with the law". Moreover, it was observed that the restrictions on the applicant's access to the child were imposed with the legitimate aim of protecting her health and rights.

It was then considered whether the measures at issue could be regarded as "necessary in a democratic society", that is proportionate to the legitimate aim pursued. The State's margin of appreciation was emphasised. It was also reiterated that a care order should in principle be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and any measures implementing temporary care should be consistent with the ultimate aim of reuniting the parents and the child. Thus, severe and lasting restrictions on access which are of a long duration were particularly likely to be disproportionate to the legitimate aims pursued. The Court found it appropriate to examine the applicant's complaints separately in relation to two periods: between 11 December 2003 and 25 January 2005; and from 25 January to 2 November 2005.

Regarding the former, the Court noted that the child was removed from her family on 11 December 2003 and that, despite the explicit and multiple requests of the applicant and his wife to see their daughter, the authorities denied them this opportunity for one year, one month and fifteen days until 25 January 2005, which is the date on which the domestic courts ordered the authorities not to interfere with the parents' right to communicate with their child and participate in her upbringing. It was noted that neither the removal of the child from her adoptive family nor the transfer of custody to the Agency on 28 December 2004 deprived the applicant of his right to communicate with the child under Russian law, provided it did not have a negative effect on her.

The Court therefore found a breach of Article 8 on account of the severe and unjustified restrictions imposed by the authorities on the applicant's access to the child between 11 December 2003 and 25 January 2005.

Regarding the alleged lack of access between 25 January and 25 March 2005, the Court accepted the Government's explanation, as from the case file materials it indeed transpired that the access to the foster home was restricted due to an influenza quarantine. It did not last unreasonably long and, in addition, the applicant was allowed to come and see his child through the glass window on a weekly basis both in February and March 2005. Likewise, after the influenza quarantine was lifted on 25 March and until 2 November 2005 when the child was returned to the applicant and his wife, the applicant was allowed to visit her on a weekly basis each time for around an hour. During most of those meetings the applicant also had an opportunity to see her paediatrician and tutor, as well as to pass sweets, clothes and other things to her. The Court therefore found no violation of Article 8 on account of the restrictions imposed by the authorities during this period.

Article 41

The Court awarded the applicant €5,000 in respect of non-pecuniary damage and €5,000 in respect of costs and expenses.

Blanket decision not to return insurgents' corpses to their families or disclose grave sites considered disproportionate to legitimate aims, violating Article 8

63. JUDGMENT IN THE CASE OF SABANCHIYEVA AND OTHERS v. RUSSIA

(Application no. 38450/05)
6 June 2013

1. Principal facts

The applicants were 50 Russian nationals who lived in Nalchik in the Republic of Kabardino-Balaria. They submitted they were relatives of 55 insurgents who had been killed during an attack on law-enforcement agencies in Nalchik in October 2005. The authorities acknowledged that all of the deceased referred to by the applicants had been among those killed as a result of the attack.

Immediately after the attacks, some of the applicants signed collective petitions requesting the return of their relatives' bodies for burial, to no avail. Finally, in a decision of 15 May 2006, the authorities decided not to return the insurgents' bodies, instead cremating them and not disclosing where the ashes were placed to the applicants. The applicants' initial attempts to obtain judicial review of the decision were unsuccessful since the courts refused to examine their arguments. Some of the applicants contested the Suppression of Terrorism Act and the 2003 Decree before the Constitutional Court. In a 2007 ruling, the Constitutional Court upheld the legislation as being in conformity with the Constitution. However, it interpreted it as preventing the authorities from burying bodies unless a court had confirmed the competent authority's decision.

2. Decision of the Court

The applicants complained, under Article 3, about the conditions in which the authorities had stored their relatives' bodies for identification. They alleged in particular that, for the first four days after the attack, some bodies had been stored outside the town morgue due to lack of space and, after that, had been piled on top of one another in refrigerator wagons. Further, they complained about the authorities' refusal to return their relatives' bodies and alleged that that legislation had been discriminatory as it was aimed exclusively at followers of the Islamic faith, relying on Articles 8, 13 and 14. They also alleged that the

Government withheld documents in their case-file relevant for the case, relying on Article 38 § 1.

Article 3

The Court emphasised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative depending on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim. The Court has adopted a restrictive approach with regards to complaints about moral suffering by relatives of alleged victims of security operations carried out by the authorities. For example, while a family member of a "disappeared person" has successfully claimed to be a victim of treatment contrary to Article 3, the same principle would not usually apply to situations where the person taken into custody has later been found dead. It was further reiterated that allegations of ill-treatment must be supported by appropriate evidence, which is assessed under the "beyond reasonable doubt" standard of proof. It added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.

It was acknowledged that the storage conditions of the relatives' bodies might have caused the applicants suffering, as the Government had admitted that the local facilities for refrigerated storage had been insufficient to contain all of the corpses for the first four days after the attack and that, even thereafter, they had to be piled on top of one another for storage in refrigerator wagons. However, these shortcomings had been the result of logistical difficulties caused by the events of October 2005 as well as by the high number of casualties. There had been no purposeful intention to subject the applicants to inhuman treatment or to cause them psychological suffering. Moreover, the deaths of the relatives had not resulted from actions by authorities in contravention of Article 2, in contrast with the case-law mentioned above, and they could not be said to have suffered from any prolonged uncertainty as to the fate of their relatives, given their voluntary participation in the identification process. The Court found the applicants' circumstances were not distinct in emotion or character from the emotional distress which may be regarded as inevitably caused to any family member of a deceased person in a comparable situation. Therefore, there was no violation of Article 3.

Article 8

The Court noted that, in Russia, the relatives of deceased people willing to organise interment generally enjoyed a statutory guarantee of having the bodies returned promptly to them for burial after the cause of the death had been established. Therefore, the authorities' refusal to return the bodies had constituted an exception from the general rule. Moreover, it had clearly deprived the applicants of an opportunity to organise and take part in the burial of their relatives as well as to know the location of the gravesite for potential visits. Therefore, the decisions not to return the bodies to their families had constituted an interference with the applicants' private and family life, with the exception of the nineteenth applicant**,** who was not officially married to one of the victims but had lived with him since February 2005, where the decision was found to have constituted an interference with her private life only.

The Court also considered that the refusal of the authorities to return the bodies, based on the Suppression of Terrorism Act and the 2003 Decree, had a legal basis in Russian law. The refusal also had legitimate aims, namely the prevention of disorder during the burials, the protection of the victims' relatives' feelings and the minimisation of the psychological impact on the population.

The Court then turned to consider whether the measure was "necessary in a democratic society", that is whether it answered a "pressing social need" and, in particular, if it was proportionate to the legitimate aim pursued, and if the reasons adduced by the national authorities to justify it were "relevant and sufficient". It was stressed that competent national authorities have a margin of appreciation which varies depending on factors including the nature of the right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. It reiterated that, in cases arising from individual petitions, its task is usually not to review the relevant legislation or a particular practice in the abstract. Instead, it must determine the effect of the interference on the particular applicants' right to private and family life.

The Court observed that it was aware that States faced particular challenges from terrorism and terrorist violence and as such, authorities could reasonably be expected to intervene with a view to avoiding possible disturbances or unlawful actions by those supporting or opposing activities of the deceased. However, the Court found it difficult to agree that the goals referred to by the Government, albeit legitimate, had been a viable justification for denying the applicants any

participation in the funeral ceremonies, or at least some kind of opportunity for paying their last respects. Indeed, the complete ban on disclosing the location of the graves permanently cut any link between the applicants and their deceased relatives' remains.

Moreover, when deciding not to return the bodies, the authorities had neither used a case-by-case approach nor taken into account the individual circumstances of each of the deceased and those of their family members. On the contrary, those decisions had been purely automatic, and ignored the authorities' duty under Article 8 to ensure that any interference with the right to respect for private and family life be justified and proportionate in the individual circumstances of each case. In the absence of such an individualised approach, the refusal had mainly appeared to have a punitive effect on the applicants by shifting the burden of unfavourable consequences from the deceased persons' activities to their relatives.

The Court therefore concluded that the refusal to return the bodies to their families had amounted to a violation of the applicants' rights to respect for their private and family life, with the exception of the nineteenth applicant, where the refusal was found to have constituted a violation of her right to respect for private life only.

Article 13 taken in conjunction with Article 8

It was observed that Article 13 guarantees the availability of a remedy at national level by which to complain about a breach of Convention rights. Though States have discretion, the remedy must involve a competent body dealing with the complaint's substance and appropriate relief. The Court reiterated the scope of this obligation varies depending on the nature of the applicants' complaint, but the remedy must in any event be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State.

It noted the absence of effective judicial supervision concerning the decisions by the authorities not to return the bodies to their families. Although the 2007 Ruling adopted by the Constitutional Court had improved the applicants' situation, the Russian courts had remained competent to review only the formal lawfulness of the measures and not the need for the measure as such. Therefore, the legislation had not provided the applicants with sufficient procedural safeguards against

arbitrariness. Indeed, they had not enjoyed an effective possibility of appealing the decision of 15 May 2006 owing to the authorities' refusal to provide them with a copy of their decision and the limited competence of the courts in reviewing such decisions. Hence, the Court concluded that there had been a violation of Article 13, taken together with Article 8.

Article 14 taken in conjunction with Article 8

The Court found no indication which would have enabled it to conclude that the legislation had been directed exclusively against followers of the Islamic faith. Hence, the Court concluded that there had been no violation of Article 14 read in conjunction with Article 8.

Article 38 § 1

This obligation requires States to furnish all necessary facilities to the Court to make a proper and effective examination of applications possible. The Court observed that the Government had submitted copies of documents which had considerably facilitated the examination of the case, and it therefore concluded that there had been no violation of Article 38 § 1.

Article 41

The Court held the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicants and awarded them €15,000 jointly in respect of costs and expenses.

X. Freedom of expression/ right to information

The authorities' failure to inform the local population of the risk of an accident at a nearby chemical factory and of the procedure to follow if such an event were to occur violated Article 8

64. GRAND CHAMBER JUDGMENT IN THE CASE OF GUERRA AND OTHERS v. ITALY

(Application no. 14967/89)
19 February 1998

1. Principal facts

The 40 applicants all lived in Manfredonia which was approximately one kilometre away from Enichem's chemical factory in Monte Sant'Angelo. The factory produced fertilisers and caprolactam and was classified as "high risk" in 1988 under Presidential Decree no. 175 ("DPR 175/88") which implemented the Council of the European Communities' Directive 82/501/EEC ("the Seveso directive") on the major-accident hazards of industrial activities which are dangerous to the environment and the local population.

The Government did not dispute the applicants' allegation that the factory's production cycle emitted large quantities of flammable gas and arsenic trioxide. In addition, dangerous accidents had already occurred at the factory. The most serious accident was on 26 September 1976, when the factory's scrubbing tower for the ammonia synthesis gases exploded and several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped. As a result, 150 people were hospitalised with acute arsenic poisoning. Further, in a report of 8 December 1988, a committee of technical experts appointed by the Manfredonia District Council established that emissions from the factory were often channelled to Manfredonia. The report also noted that the factory had refused to allow the committee to carry out its own inspection and that results of a study done by the factory showed that the emission treatment equipment was inadequate and that the environmental impact assessment was incomplete.

Articles 11 and 17 of DPR 175/88 required the authorities to inform the local population of hazards of industrial activity, the safety measures, the emergency plans and the accident procedure. In September 1993, the Ministry for the

Environment and the Ministry of Health adopted conclusions on the factory's safety which included a number of suggestions for improvement and provided the prefect of Foggia with instructions for the emergency plan.

The factory stopped producing fertiliser in 1994 but continued to operate as a thermoelectric power station and a plant for treatment of feed and waste water. However, in a letter of 7 December 1995 to the European Commission of Human Rights, the mayor of Sant'Angelo stated that he had not received any documents relating to the Ministries' investigation and that the District Council was still awaiting instructions from the Civil Defence Department to decide the appropriate safety measures and procedures.

2. Decision of the Court

The applicants alleged that the authorities' failure to inform them of the risk of an accident at the factory and how to proceed in such an event violated Articles 10, 8 and 2 of the Convention.

Article 10

The applicants argued that Article 10 imposed a positive obligation on States to collect, process, and disseminate information on environmental matters to the public, as such information would not otherwise become public knowledge. However, the Court did not accept this view. While the public's right to receive information included freedom of the press, the facts of the present case were clearly distinguished from the Court's case-law on this subject since the applicants complained of a failure in a system set up by DPR 175/88 made pursuant to the Seveso directive.

The freedom to receive information under Article 10 prohibits the State from restricting individuals' receipt of information from others. That freedom could not be construed to impose positive obligations on the State to collect and disseminate information. Accordingly, the Court held that Article 10 was not applicable to the present case.

Article 8

The Court noted that in 1976, 150 people were hospitalised with acute arsenic poisoning after an explosion caused several tonnes of potassium carbonate and

bicarbonate solution with arsenic trioxide to escape from the factory's scrubbing tower. Further, the report of 8 December 1988 concluded that emissions from the factory were often channelled towards Manfredonia. Article 8 was hence applicable in the present case since the toxic emissions had a direct effect on the applicants' right to respect for private and family life. It could not be said that Italy had "interfered" with this right since the applicants had only complained of the State's failure to act. Nevertheless, Article 8 also imposes a positive obligation to provide effective protection from arbitrary interference with the applicants' right to respect for private and family life.

Severe environmental pollution can affect individuals' well-being and prevent them from enjoying their homes in such a way as to adversely affect their private and family life. Despite the adoption of an emergency plan in September 1993 by the Ministry for the Environment and the Ministry of Health, the applicants had waited until 1994, at which point production of fertilisers had stopped, for essential information that would have enabled them to assess the risk that continued residence at Manfredonia would pose to their families. Therefore, the State had failed in its positive obligation to secure the applicants' right to respect for their private and family life. Accordingly, the Court held that there had been a violation of Article 8.

Article 2

In light of its conclusion under Article 8, the Court held that it was unnecessary to examine the case under Article 2.

Article 50 (now Article 41)

The Court awarded ITL 100,000,000 (approximately €51,688) to each applicant for non-pecuniary damage.

Refusal to provide an NGO with information on a matter of public interest violated its right of access to information under Article 10

65. GRAND CHAMBER JUDGMENT IN THE CASE OF MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY

(Application no. 18030/11)
8 November 2016

1. Principal facts

The applicant, Magyar Helsinki Bizottság (Hungarian Helsinki Committee), was a non-governmental organisation (NGO) founded in 1989. Its main activities consisted of monitoring the implementation of international human rights standards in Hungary and the human rights performance of law enforcement agencies and the judicial system.

Between 2005 and 2009, the applicant NGO conducted a series of projects examining the effective enforcement of the right to defence in Hungary, concluding that the *ex officio* appointment of defence counsel did not operate adequately. In 2009, it launched a new project aiming at the replacement of the existing system of discretionary appointments by a randomised computer-generated one. For the purposes of this project, the organisation requested the names of the public defenders selected in 2008 and the number of assignments given to each lawyer from a total of twenty-eight police departments. These requests were made under the provisions of the Hungarian Data Act concerning the disclosure of information of public interest.

The majority of the police departments disclosed the requested information, either immediately or following a successful legal challenge by the applicant NGO. However, two police departments rejected the request on the basis that the names of the defence counsel were not public-interest data nor information subject to disclosure in the public interest under section 19(4) of the Data Act.

In September 2009 the applicant NGO challenged the above rejection to disclose the information requested before the Debrecen District Court, which in October 2009 ordered the two police departments to release the relevant information within 60 days. Both departments appealed before the Hajdú-Bihar County Regional Court, which overturned the first-instance judgment and

dismissed the applicant NGO's claim in its entirety. The organisation then sought review of the second instance judgment, however this was dismissed by the Supreme Court in September 2010.

2. Decision of the Court

The applicant NGO complained that the authorities' denial of access to the information sought by it from certain police departments represented a breach of its rights as set out in Article 10 of the Convention.

Article 10

In its assessment of the applicability of Article 10 in the present case, the Court accepted that, notwithstanding the fact that the text of Article 10(1) does not include a freedom to *seek* information, this Article could be interpreted as including, in the circumstances of the case, a right of access to state-held information.

Particularly, in view of the principle of securing Convention rights in a practical and effective manner, the Court found that an individual right of access to information held by a public authority, or a Government's obligation to impart such information to the individual, may arise in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right. It set out the criteria for assessing whether the particular circumstances of a case fell within the scope of such a right as comprising of the following preconditions: the purpose of the request should be to enable one's exercise of the freedom to receive and impart information and ideas to others, the applicant should act in its role as a social watchdog, and the information sought must relate to an issue of public interest and also be ready and available.

In light of the above, the Court held that the information sought by the applicant NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to a discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO's exercise of its freedom to receive and

impart information, in a manner striking at the very substance of its Article 10 rights.

Having affirmed the applicability of Article 10 in the particular case, the Court moved on to assess whether the interference with the enjoyment of this right was justified. In that respect, the Court accepted that the interference had been prescribed by law and the restriction on the applicant's freedom of expression pursued the legitimate aim of protecting the rights of others.

The central issue underlying the applicant NGO's grievance was that the information sought was characterised by the authorities as personal data not subject to disclosure, on the premise that, under Hungarian law, the concept of personal data encompassed any information that could identify an individual. Such information was not susceptible to disclosure, unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental functions or was related to other persons performing public duties. Since the Supreme Court's ruling excluded public defenders from the category of "other persons performing public duties", there was no legal possibility open to the applicant NGO to argue that disclosure of the information was necessary for the discharge of its watchdog role.

The information requested consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings, and therefore of activities not of a private nature. Moreover, the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients. Furthermore, the Court found that the disclosure of the above information would not have subjected public defenders to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders, considering that the information sought, though not collated at the time of the survey, could be known to the public through other means.

Against this background, namely the nature of the information as relating to activities of public matters, the fact that it was already available to the public as well as the foreseeability of its disclosure, the Court found that there was no reason for the government to invoke Article 8 and attempt to strike a balance

between the applicant NGO's right to receive information under Article 10 and the defence counsels' right to respect for private life under Article 8. The Court stressed that the protection of the private interests of public defenders constituted a legitimate aim permitting a restriction on freedom of expression; it did, however, find that the means used to protect those interests were not proportionate to the aim sought to be achieved, in that it had not been necessary in a democratic society within the meaning of Article 10(2) of the Convention.

The Court concluded that the relevant Hungarian law, as interpreted by the competent domestic courts, excluded any meaningful assessment of the applicant's freedom-of-expression rights under Article 10, in a situation where any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest that was also closely related to a right of paramount importance, that is, the right to a fair hearing – would have required the utmost scrutiny. The information sought did not involve information outside the public domain and consisted only of information of a statistical nature within the framework of the publicly funded national legal-aid scheme. Hence, there had been a violation of Article 10.

Article 41

The Court awarded the applicant €215 in respect of pecuniary damage, and €8,875 for costs and expenses.

Journalist's sentence for defamation following incorrect claims relating to a 13-year-old girl having an abortion was "manifestly disproportionate" in its nature and severity, violating Article 10

66. JUDGMENT IN THE CASE OF SALLUSTI v. ITALY

(Application no. 22350/13)
7 March 2019

1. Principal facts

The applicant was an Italian national born in 1957. In 2007 he was editor-in-chief of the *Libero* national daily newspaper, which had a circulation of approximately 125,000 copies per day. In February that year *Libero* published two articles stating that a 13-year-old girl had been forced to have an abortion by her parents and a guardianship judge. Other media had covered the incident the previous day but had ultimately reported that she had not been forced into the abortion but had wanted it herself.

In April 2007 the guardianship judge filed a criminal complaint of defamation against the applicant. He was found guilty in January 2009 of failure by a newspaper editor-in-chief to control what had been published in relation to one of the articles and of aggravated defamation with regard to the other. He was fined, ordered to pay damages and costs and to publish the court's judgment.

On appeal, the penalty was increased in June 2011 to one year and two months imprisonment and the damages were tripled to €30,000. The Court of Cassation upheld the custodial sentence in September 2012, however, the court executing the sentence let him serve it under house arrest.

In December 2012 Italy's President, referring in his decision to criticism by the European Court of Human Rights of custodial penalties for journalists, commuted the applicant's sentence into a fine. He had by that time spent 21 days under house arrest.

2. Decision of the Court

The applicant argued that his conviction for defamation and for failure to exercise control over the content of a publication had breached his rights to freedom of expression under Article 10.

Article 10

The applicant's conviction amounted to an interference with his right to freedom of expression. The interference was made pursuant to the Criminal Code and the Press Act and was therefore "prescribed by law". It also accepted that conviction was intended to pursue the legitimate aim of protecting the reputation and rights of the 13-year old girl and her parents, as well as those of the guardianship judge.

The Court went on to examine whether the conviction was "necessary in a democratic society". It agreed with the domestic court's findings that the articles had misinformed the public, despite the clarifications issued prior to publication and that the applicant had seriously tarnished the guardianship judge's honour and his right to privacy, as well as that of all those involved. It further agreed that the applicant failed to observe the ethics of journalism when he published an article without checking its truth. Further, the head of a newspaper remained responsible for the contents of its articles in exercise of his control. As such, his conviction met a "pressing social need" and the authorities were justified in deeming it necessary to restrict the exercise of his right to freedom of expression.

The Court then considered whether the conviction was proportionate to the legitimate aim. While sentencing is a matter for national courts, the right to freedom of expression required that a custodial sentence for media-related offences is only given in exceptional circumstances; namely where other fundamental rights have been seriously impaired, such as in cases of hate speech or incitement to violence. It was also acknowledged that Italy had taken recent positive steps, such as limiting the use of criminal sanctions for defamation and introducing the removal of imprisonment as a sanction for defamation.

Nevertheless, the applicant had been ordered to pay compensation and spent 21 days under house arrest. The Court considered that there was no justification for a prison sentence in this case as such a sanction would inevitably have a chilling effect. This conclusion was not altered by the fact that the prison sentence had been suspended given the conversion of a custodial sentence into a fine was at the sole discretion of Italy's President and such clemency did not expunge the conviction itself. Therefore, the criminal sanction imposed on the applicant was manifestly disproportionate in both nature and severity to the legitimate aim. Accordingly, the Court held that there had been a violation of Article 10.

Article 41

The Court awarded the applicant €12,000 in respect of non-pecuniary damage and €5,000 for costs and expenses.

A refusal to allow the ship of an activist organisation to enter Portuguese territorial waters to conduct a campaign to legalise abortion violated Article 10 as it was disproportionate to the aim of protecting public health

67. JUDGMENT IN THE CASE OF WOMEN ON WAVES AND OTHERS v. PORTUGAL

(Application no. 31276/05)
3 February 2009

1. Principal facts

The applicants were Women on Waves, a Dutch foundation, and two Portuguese associations, Clube Safo and Não te Prives. All three associations sought, amongst other aims, to promote debate on the topic of women's reproductive rights.

In 2004, the Portuguese associations invited Women on Waves to join them to campaign for the decriminalisation of abortion in Portugal. The latter sent a ship, the *Borndiep,* to Figueria da Foz to hold meetings and workshops on the prevention of sexually transmitted diseases, family planning and the decriminalisation of abortion, which were scheduled to take place on board the *Borndiep* from 30 August to 12 September 2004.

On 27 August 2004, a ministerial order banned the *Borndiep* from entering Portuguese territorial waters on the basis of maritime and Portuguese health laws. The authorities also sent a Portuguese war ship to block the *Borndiep's* entry. The applicant associations made a request to the Administrative Court of Coimbra to issue an order authorising the immediate entry of the *Borndiep* into Portuguese waters. They argued that the ban on entry into Portuguese waters violated their rights to freedom of expression, association and protest and violated the principle of the right to free movement of people. On 6 September 2004, the Administrative Court rejected their request, holding that the associations intended to administer the RU486 abortion pill, which was illegal in Portugal, to Portuguese women. The applicants unsuccessfully appealed this decision to the Northern Administrative Court. The Supreme Administrative Court similarly rejected their application on the grounds that the question was not of sufficient legal or social importance to justify its intervention.

2. Decision of the Court

The applicants complained that the authorities' refusal to allow *Borndiep* into Portuguese waters violated Articles 5, 10 and 11 and Article 2 of Protocol No. 4.

Articles 10 and 11

The Court noted that freedom of expression was difficult to separate from the right to freedom of assembly. However, as the applicants' complaints concerned the authorities' interference with their right to inform the public of their position on women's rights and abortion, it was appropriate to examine their complaint under Article 10 alone, without examining the case separately under Article 11.

It was not disputed between the parties that the interference was "prescribed by law". The Court also accepted that the interference pursued the legitimate aim of the prevention of disorder and the protection of health. The Court found that the right to freedom of expression included the right to choose the most effective way to convey a set of ideas without unreasonable interference by the authorities. It accepted that restrictions on this right could substantially affect the substance of the relevant ideas and information, particularly in instances of symbolic protest concerning fundamental rights and freedoms. The interference with the applicants' right to freedom of expression prevented them from conducting their campaign in a manner which was crucially important to them, as campaigning on board their ship was deemed the most effective way of transmitting information, and was consistent with the way activities had been carried out by Women on Waves in other European States for some time.

The case was distinguished from earlier case law where the Court had found that there was no obligation on States to create a right to enter private or publicly owned property to exercise the right to freedom of expression where alternative means of doing so existed. The present case did not involve private or publicly owned property but Portuguese territorial waters which were an open and public space. Nor did it concern the State's positive obligation to facilitate expression, but its negative obligation not to arbitrarily interfere with the applicants' freedom of expression, in relation to which the State's margin of appreciation was narrower.

Further, there was insufficient evidence to suggest that the applicant associations intended to violate Portuguese abortion law. Nor was there any evidence to support the Administrative Court's finding of 6 September 2004 that

the applicant associations had intended to distribute the medication found on board. In any event, the authorities could have taken less prejudicial measures to achieve its legitimate aims. For example, instead of a total entry ban and the positioning of a military ship, they could have seized the RU486 abortion pills before the ship's entry into Portuguese territory. The Court acknowledged the importance that the State accorded to its abortion law, but emphasised that freedom of expression was most valuable when presenting ideas that offend, shock and challenge the established order.

The measures taken were found to be so severe that they would have the effect not only of dissuading the applicants from exercising their rights, but also of discouraging others from challenging the established social order. As such, the interference was disproportionate to the legitimate aim pursued and was not "necessary in a democratic society". Accordingly, there had been a violation of Article 10.

Articles 5, 6 and Article 2 of Protocol No. 4

Having regard to its conclusion under Article 10, the Court considered that it was unnecessary to examine the other complaints separately under Articles 5, 6 and Article 2 of Protocol No. 4.

Article 41

The Court awarded each applicant €2,000 in respect of non-pecuniary damage and €3,309.40 for costs and expenses.

Serbian Intelligence Agency must give access to information it obtained via electronic surveillance in order to protect the right to freedom of expression of an NGO

68. JUDGMENT IN THE CASE OF YOUTH INITIATIVE FOR HUMAN RIGHTS v. SERBIA

(Application no. 48135/06)
25 June 2013

1. Principal facts

The applicant was a non-governmental organisation set up in 2003 and based in Belgrade. It monitored the implementation of transitional laws with a view to ensuring respect for human rights, democracy and the rule of law.

On 31 October 2005 the applicant requested the intelligence agency of Serbia to inform it how many people had been subjected to electronic surveillance by that agency in 2005. On 4 November 2005 the agency refused the request, relying thereby on section 9(5) of the Freedom of Information Act 2004.

The applicant complained to the Information Commissioner, a domestic body set up under the Freedom of Information Act 2004 to ensure the observance of that Act, on 17 November 2005.

On 22 December 2005 the Commissioner found that the intelligence agency had breached the law and ordered that the information requested be made available to the applicant within three days. The agency appealed, but on 19 April 2006 the Supreme Court of Serbia held that it lacked standing and dismissed its appeal.

On 23 September 2008 the intelligence agency notified the applicant that it did not hold the information requested.

2. Decision of the Court

The applicant complained, under Article 10 of the Convention, that the intelligence agency of Serbia had denied it access to certain information concerning electronic surveillance, despite a final and binding decision of the Information Commissioner in its favour.

Article 10

The Court noted that the refusal to provide the requested information to the applicant who was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, constituted an interference with the right to freedom of expression.

While the exercise of freedom of expression may be subject to restrictions, such restrictions need to be in accordance with the law. The Court found however that the restrictions imposed by the intelligence agency in the present case did not meet that criterion. The domestic body set up precisely to ensure the observance of the Freedom of Information Act 2004 examined the case and decided that the information sought had to be provided to the applicant. It was true that the intelligence agency eventually responded that it did not hold that information, but that response was unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response.

The Court concluded that the obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner was in defiance of domestic law and tantamount to arbitrariness.

Article 6

Having regard to the findings above, the Court considered that it was not necessary to examine the same complaint under Article 6.

Article 46

It was not in principle for the Court to determine what remedial measures might be appropriate following a judgment. However, the violation found in this case, by its very nature, did not leave any real choice as to the measures required to remedy it. Therefore, the most natural way to implement its judgment in this case would be to ensure that the agency provided the applicant NGO with the information it had requested, namely, how many people had been subjected to electronic surveillance in 2005.

Article 41

The Court considered that the finding of a violation and the order made under Article 46 constituted sufficient just satisfaction for any non-pecuniary damage which the applicant might have suffered.

XI. Freedom of assembly

The evacuation of migrants occupying a church did not violate the right to freedom of peaceful assembly under Article 11 where the dispersal was carried out to protect the health of the participants and where sanitary conditions were inadequate

69. JUDGMENT IN THE CASE OF CISSE v. FRANCE

(Application no. 51346/99)
9 April 2002

1. Principal facts

The applicant was a Senegalese national, and a member of and spokeswoman for a group of foreign nationals without residence permits in France. The group participated in collective action to raise awareness of the difficulties encountered in obtaining a review of their immigration status in France. From June to August 1996, the applicant occupied St Bernard's Church ("the Church") in Paris with approximately 200 other illegal immigrants, which became known as the "St Bernard's sans papiers" movement. Ten occupants went on hunger strike. The campaign received widespread coverage in the press and was supported by several human rights organisations.

On 22 August 1996, the Paris Police Commissioner made an order for the total evacuation of the Church on the grounds that the occupation was unrelated to religious worship, there was a deterioration in the already poor sanitary conditions, padlocks had been placed on the Church exits and there were serious sanitary, health, peace, security and public-order risks. The following morning, police evacuated the Church, stopping and questioning all occupiers. White people were immediately released whereas all non-white occupants, except those on hunger strike, were sent by coach to a detention centre. Orders were made for the detention and deportation of almost all concerned, but more than one hundred were subsequently released on account of irregularities on the part of the police, including the making of false reports.

The applicant who did not have a residence permit was charged with entering and staying in France illegally, and was given a two-month suspended sentence. On 23 January 1997, the Paris Court of Appeal upheld the sentence and added

an order excluding her from French territory for three years. On 4 June 1998, the Court of Cassation dismissed the applicant's appeal.

2. Decision of the Court

The applicant complained that the evacuation of the Church violated her right to freedom of peaceful assembly with other foreign nationals, for the purposes of denouncing their treatment, under Article 11.

Article 11

The Government argued that the applicant's right to peaceful assembly was not engaged as the occupation of the Church sought to defend and legitimise a deliberate breach of the French immigration rules, it was therefore unlawful, entailed a breach of public order and could not be regarded as "peaceful". The occupation was also argued to unreasonably curtail the rights of others to freedom of assembly by preventing local residents from entering the Church to worship. The Court noted however that the occupation was supported by the priest and the parish council of the Church, and that all religious services and ceremonies had proceeded as planned and without incident. The occupation of the Church as part of a campaign to draw attention to the difficulties obtaining review of the immigration status of the participants did therefore constitute a "peaceful assembly", and the Court found the evacuation of the Church was an interference with the applicant's right to freedom of peaceful assembly.

The Court found the interference in issue was prescribed by law, as under the Law of 9 December 1905 on the Separation of Church and State, local authorities (rather than the parish priest) were responsible for supervising religious ceremonies and empowered to act, either at the priest's request or on their own initiative.

The evacuation was ordered to put an end to the continuing occupation of individuals, including the applicant, who had broken French law. Therefore, the Court stated the interference pursued a legitimate aim: the prevention of disorder. The Court did not however accept the Government's position that the applicant's status as an illegal immigrant justified a breach of her rights under Article 11. Firstly, the Court noted her rights had already been exercised for two months without intervention from the authorities. Secondly, where a person protested peacefully against a law, the fact that the person was in breach of the law that they protested against was not one of the legitimate reasons for which a limitation on

the right to peaceful assembly was permitted under Article 11(2).The fact that the applicant was in breach of the laws on obtaining legal residence in France, against which she was protesting, was not therefore a reason to limit her right to protest against these laws under Article 11(2).

The Court nevertheless observed that, despite its peaceful nature and lack of disturbance, the occupation eventually resulted in the hunger-strikers' health deteriorating and sanitary conditions becoming inadequate. In these circumstances, the Court accepted that restrictions on the exercise of the applicant's right to assembly may have become necessary, though it noted the methods used by the police went beyond what was reasonable to expect when limiting freedom of assembly. Moreover, the Court noted in any event the symbolic and testimonial value of the occupation had been tolerated sufficiently long enough, approximately two months, for the interference not to appear unreasonable.

Therefore, the Court held that there had been no violation of Article 11 of the Convention.

The restrictions on public gatherings and demonstrations imposed by the Swiss government during the Covid-19 pandemic violated the applicant's Article 11 right to freedom of assembly and association

70. JUDGMENT IN THE CASE OF COMMUNAUTÉ GENEVOISE D'ACTION SYNDICALE (CGAS) V. SWITZERLAND[757]

(Application no. 21881/20)
15 March 2022

1. Principal Facts

The applicant, Communauté genevoise d'action syndicale (CGAS), is an association under Swiss law with its registered office in Geneva, founded in 1962. Its declared aim is to defend the interests of working and non-working persons and of its member organisations, especially in the sphere of trade-union and democratic freedoms. It does this, in part, by organising and participating in multiple demonstrations each year.

In response to the Covid-19 pandemic in 2020, the Swiss government adopted measures to prevent the spread of the virus. Under Ordinance O.2 Covid 19, enacted by the Federal Council on 13 March 2020, schools and colleges were closed and demonstrations of more than 100 people were banned. On 16 March 2020, the Federal Council modified the Preamble of Ordinance O.2 Covid-19, banning all public and private demonstrations. Failure to comply was punishable by a custodial sentence or fine. The possibility of applying for authorisation for an exemption from the ban where necessary to exercise political rights was removed from this version of the Ordinance.

The Federal Council tightened the measures between 16 March and 29 April, prohibiting the gathering of more than five people in public spaces. The measures were relaxed on 11 May 2020 and resulted in the reopening of public spaces including schools, stores, restaurants, museums, and libraries.

On 26 May 2020, the applicant association applied to the Court, complaining that, following the enactment of Ordinance O.2 Covid-19, it had been obliged

[757] This case was referred to the Grand Chamber on 5 September 2022, meaning this judgment of the third section of the Court is not final and a new judgment of the Grand Chamber will be delivered in respect of the case.

to cancel a rally planned for 1 May 2020 and had withdrawn its request for authorisation. More generally, it was not permitted to organise or to take part in any public meetings.

On 27 May 2020, the Federal Council decided on further steps to re-open society. From 30 May 2020, the ban on gatherings was relaxed, so that a maximum of 30 participants could assemble at one time. From 6 June 2020, private and public events for up to 300 people were allowed again, as well as political rallies. On 20 June 2020, the ban on demonstrations was lifted, but mask-wearing remained compulsory. Events with more than 1,000 people were banned until the end of August 2020.

2. Judgment of the Court

The applicant complained under Article 11 (freedom of assembly and association) of the Convention of being deprived of the right to organise and participate in public events following the government measures adopted under Ordinance O.2 COVID-19.

Admissibility

With regard to victim status, the Court reiterated that the term "victim" under Article 34 of the Convention must be interpreted independently from domestic concepts such as those of interest or standing to bring proceedings under national law. *Actio popularis* claims are not admissible by the Court, nor can applicants complain about a provision of domestic law simply because it seems to them that it infringes the Convention. With regard to not-for-profit organisations, they cannot claim to be victims themselves on the basis that a measure interferes with the rights of their members. However, in the present case, the applicant association itself had been obliged to adapt its conduct in order to avoid criminal sanctions and to refrain from organising events that would have contributed to the realisation of its objective. In particular, it had to cancel a demonstration which it had organised to take place on 1 May 2020. It could therefore claim to be a "victim" within the meaning of the Convention.

With regard to exhaustion of domestic remedies, the Court noted that under Article 35 § 1, domestic remedies must exist with a sufficient degree of certainty in practice as well as in theory. The Swiss government argued that the applicant could have applied for permission to hold a demonstration and then

sought judicial review of the refusal to grant this application. The Court accepted that in normal circumstances, such federal ordinances could be the subject of a preliminary ruling on constitutionality by the Swiss courts. However, the Court reviewed other examples of how similar cases had been handled by the domestic courts during the pandemic and found that there had been no rulings on the constitutionality of the ordinance, and even the first instance judgments in these cases had been delivered after the date in relation to which an authorisation to hold a demonstration was sought. The Court found, therefore, that in the very particular circumstances of the Covid-19 lockdown, it would have been very unlikely that the Swiss domestic tribunals would have carried out a review of the merits of the case or the compatibility of Ordinance O.2 COVID-19 with the Convention, within a reasonable time (i.e. prior to the date on which they sought to hold the demonstration). Further, except during the very short period of time from 13 to 16 March 2020, the ordinance provided that it was not possible to apply to request authorisation to derogate from the general ban on demonstrations in order to exercise political rights. The Court found, therefore, that at the relevant time, in practice the applicant did not have access to an effective remedy which would have enabled them to complain of a violation of their Article 11 rights.

Article 11

The Court reiterated that any interference with the right to freedom of assembly can only be justified if the requirements of Article 11 § 2 are met. The interference must have been prescribed by law, in pursuit of one of the four legitimate aims listed in the paragraph, and must be necessary in a democratic society. The Court examined whether each of the three conditions were met in the present case.

Regarding the legal basis, the Court emphasised that the words "prescribed by law" in the Convention not only require that the impugned measures have a basis in domestic law, but also refer to the quality of the law in question. However, as it considered the contested measures excessive in light of the criterion of necessity in a democratic society, the Court did not consider itself obliged to rule on whether the quality of the law in the present case complied with the requirements of Article 11 § 2.

Regarding the legitimate aim, the Court accepted the Government's argument that the impugned measures pursued two particular aims within the meaning of Article 11 § 2, namely the protection of health and the protection of the rights and freedoms of others.

Regarding the necessity of the measures in a democratic society, the Court assessed the contested measures against the principles set out in its case-law on the subject.

First, the Court noted that while Switzerland enjoyed a certain margin of appreciation in determining the restrictions on the rights and freedoms guaranteed by the Convention, this margin was not unlimited. In the present case, the Court recognised that the threat from Covid-19 was very serious, knowledge was limited regarding the severity of the threat posed by the virus and that consequently, States had to react quickly during this period. Similarly, the complex context of the pandemic gave rise to conflicting interests on the part of the State, in particular the positive obligation to protect the life and health of persons within their jurisdiction.

In light of the above, the Court reiterated its case-law to the effect that a general prohibition of certain conduct is a radical measure which requires a strong justification and particularly thorough review by the courts empowered to do so. Between 17 March and 30 May 2020, all events through which the applicant association could have continued its activities and achieved its aims were subject to a general prohibition. Even assuming a strong justification existed – namely responding adequately to the Covid-19 pandemic – the Court emphasised that as per its examination of the exhaustion of domestic remedies, it was not possible for this general prohibition to be reviewed by domestic courts. Another factor relevant to the proportionality exercise what that the general prohibition was deemed to have lasted for a considerable amount of time.

In addition, the Court noted that the Government did not justify why it was possible to maintain access to places of work on the condition that employers took certain defined protective measures (even when 100s of people worked in such places), while the organisation of a demonstrations in the open air remained prohibited. This was relevant to the proportionality assessment, as it suggested that the legitimate aim of protecting health could potentially have been served by measures which interfered to a lesser extent with the right to freedom of assembly.

Further, the Court emphasised that the quality of the parliamentary and judicial examination of the necessity of the measures at national level was particularly relevant to the margin of appreciation assessment. On the one hand, it accepted that one could not have expected in-depth parliamentary debates given the

urgency of response required in the early stages of the pandemic. However, this rendered independent and effective judicial examination of the measures all the more essential.

The Court then assessed the nature and severity of the penalties to be imposed in the event of a violation of the ban on demonstrations set out by Ordinance O.2 Covid-19. The Court reiterated case-law to the effect that criminal sanctions call for special justification and in principle, peaceful demonstrations should not be subject to the threat of a criminal sanction. In the present case, failure to comply was punishable by a prison sentence of up to three years or a monetary penalty. The Court considered that the nature of these penalties was likely to have a chilling effect on potential organisers of and participants in events.

As a final point, the Court noted that in the face of the global pandemic, Switzerland had not made use of Article 15 of the Convention allowing a State to take certain measures derogating from the obligations provided for by the Convention in defined circumstances. Consequently, it was bound to comply fully with the requirements of Article 11.

In conclusion, the Court held that in light of the importance of the right to peaceful protest in a democratic society (and the importance of the values the applicant association existed to protect), the blanket character and considerably long duration of the ban, and the nature and severity of the penalties provided for, the interference with Article 11 was not proportionate to the aims pursued. Further, the domestic courts had not exercised effective control or review of the measures subject to the complaint, meaning the Swiss government had exceeded the margin of appreciation from which it benefitted in this context.

Accordingly, there had been a violation of Article 11.

Article 41

The Court found that the finding of a violation constituted sufficiently just satisfaction in respect of any non-pecuniary damage sustained by the applicant.

XII. Freedom of movement including the right to leave a country and enter his/her own country

Violation of Article 2 § 2 of Protocol No. 4 on account of the failure to periodically assess a ban on the applicant leaving Poland during unreasonably long criminal proceedings

71. JUDGMENT IN THE CASE OF A.E. v. POLAND

(Application no. 14480/04)
31 March 2009

1. Principal facts

The applicant, A.E., was a Libyan national born in 1950. On 15 December 1999, he was arrested and remanded in custody by the District Court of Suwalki, and on 27 March 2000, he was charged with attempted fraud and forgery. On 10 April 2000, the applicant's detention was extended until 31 May 2000. He appealed, but this was dismissed by the Piotrków Trybunalski Regional Court on grounds of reasonable suspicion that he had committed the offence, and that there was a risk of absconding due to a lack of permanent address in Poland.

The case was subsequently transmitted to two different district courts, until the Suwalki District Prosecutor released the applicant on bail on 29 December 2000. However, the Prosecutor prohibited the applicant from leaving Poland, referring to the need to secure the proper conduct of the investigation, and to the reasonable suspicion that the applicant had committed the alleged offences.

On 13 October 2005 the Jaworzno District Court sentenced the applicant to one year and six months imprisonment, against which the applicant and prosecutor appealed. The applicant was not placed in detention. On 13 March 2007 the Katowice Regional Court quashed the judgment and remitted the case to the Jaworzno District Court.

Meanwhile, on 20 July 2006, the applicant asked that the prohibition on him leaving Poland was waived, submitting that his sister had died, and he wanted to visit his ailing mother in Libya. On 23 August 2006, the Katowice Regional Court dismissed this application, stating that if the prohibition was lifted there were serious grounds to believe the applicant would go into hiding.

In June 2005 and January 2007, the applicant complained to the Katowice Regional Court under the Law of 17 June 2004, stating his right to a fair trial within a reasonable time had been breached. Both complaints were dismissed. In relation to the second complaint, the Regional Court examined the length of proceedings after 3 June 2005 and found there had been no inactivity or undue delay and therefore no breach of the right to trial within a reasonable time. At the time of the judgment of the European Court, the criminal proceedings against the applicant were still pending before the District Court.

2. Decision of the Court

The applicant complained that the excessive length of the criminal proceedings violated his rights under Article 6. He further complained his associated ban from leaving Poland for eight years was a violation of his right to freedom of movement under Article 2 of Protocol No. 4. Moreover, he argued this ban prevented him from visiting his ailing mother and attending his sister's funeral, therefore violating his rights under Article 8.

Article 6

The period of time taken into consideration lasted over nine years, beginning on 15 December 1999 when the applicant was arrested, and continuing to the date of the present judgment. The Court reiterated that whether proceedings had been conducted within "a reasonable time" must be assessed in the light of the circumstances of the case, particularly: its complexity, the conduct of the applicant and relevant authorities, and what was at stake for the applicant. The Court stated it had frequently found violations of Article 6 § 1 in cases similar to the one at hand and considered the Government had not put forward any material capable of persuading it otherwise.

Therefore, the Court held there had been a breach of Article 6 § 1.

Article 2 of Protocol No. 4

The Court reiterated that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement, including the right to leave any country for another country to which he or she may be admitted. Any measure restricting that right must be lawful, pursue a legitimate aim and strike a fair balance between the public interest and the individual's rights. In the present case the Court was

satisfied, firstly, that the interference with the applicant's rights was prescribed by domestic law, the travel ban having been based on Article 227 § 1 of the Criminal Procedure Code 1997. Secondly, it was also satisfied that this interference was justified in pursuing the legitimate aim of securing the applicant's availability for trial and therefore the maintenance of public order.

However, the Court considered the level of interference disproportionate. Even where a restriction on an individual's freedom of movement was initially warranted, maintaining it over a long period of time could result in it becoming disproportionate, violating the individual's rights. The Court stated lengthy restrictions must involve periodic reassessment of their justification. In the applicant's case, a reassessment was undertaken by the court on 23 August 2006 only following the applicant's request on 20 July 2006, which indicated that the travel ban was an automatic, blanket measure of indefinite duration. The Court considered this was counter to the authorities' duty under Article 2 § 2 of Protocol No. 4, specifically to take appropriate care to ensure that any interference with the applicant's right to leave Poland remained justified and proportionate throughout its duration.

Therefore, the Court held there was a breach of the applicant's rights as guaranteed by Article 2 § 2 of Protocol No. 4.

Article 8

Having regard to the above finding under Article 2 of Protocol No. 4, the Court considered it unnecessary to examine whether there had been a violation of Article 8.

Article 41

The Court awarded €8,000 to the applicant in respect of non-pecuniary damages, and €150 for costs and expenses.

Restriction not to leave place of residence instigated in accordance with criminal proceedings did not violate Article 2 of Protocol 4 as it was of a relatively short duration and permission to leave was granted when applied for

72. JUDGMENT IN THE CASE OF ANTONENKOV AND OTHERS v. UKRAINE

(Application no. 14183/02)
22 November 2005

1. Principal facts

The applicants Mr Antonenkov, Mr Stolitniy and Mr Diukin were born in 1967, 1959 and 1970 respectively, and lived in Kyiv.

On 26 June 1996, criminal proceedings against them began and they were subsequently arrested on suspicion of fraud and theft. In April and May 1997, Shevchenkovsky District Court of Kyiv released them on an undertaking not to abscond. This meant that the applicants agreed not to leave their place of residence without the permission of an investigator (or trial judge), and in the event of a breach of the written undertaking, a stricter measure of restraint could be applied.

Between April 1997 and April 2002, a total of 77 hearings were listed, many of which were adjourned or cancelled. The district court remitted the case twice. On 19 July 2002 the district court terminated proceedings concerning the charges of fraud, embezzlement and forgery. Criminal proceedings for theft were, at the time of the European Court's judgment, still pending against two of the applicants.

2. Decision of the Court

The applicants complained that the length of the criminal proceedings against them breached their right to a fair trial within a reasonable time under Article 6 § 1, and that the lengthy restriction on their freedom of movement as a result of the undertaking not to abscond breached their right to freedom of movement under Article 2 of Protocol 4.

Article 6

The Court reiterated that the period to be taken into consideration in determining the length of criminal proceedings began when a person was charged and ended when the charge was finally determined, or proceedings discontinued. The proceedings in relation to one applicant lasted for six years and one month, and in relation to the other two applicants proceedings for nine years and four months. However, only four years and ten months, and eight years and one month of these proceedings, respectively, fell within the Court's jurisdiction as the Convention only came into force in respect of Ukraine on 11 September 1997.

The Court reiterated that whether proceedings had been conducted within "a reasonable time" must be assessed in the light of the circumstances of the case, particularly: its complexity, the conduct of the applicant and relevant authorities, and what was at stake for the applicant.

Though the Court accepted there was a certain degree of complexity in the economic nature of the charges, it noted that expert opinions were delivered at the pre-trial stage and expert witnesses were not questioned by the court, and it was doubtful that the length of the case-file could itself justify the length of trial. The Court accepted that the applicants caused some delays to the proceedings, but these delays amounted to less than six months in total. Many of the other delays to proceedings were found to be attributable to the conduct of the domestic authorities, and the trial court should inter alia have fixed a tighter hearing schedule to speed up proceedings, and it had been slow to impose compulsory appearances upon the applicants after their failure to appear resulted in several adjournments.

Therefore, the Court considered that the length of the proceedings did not satisfy the "reasonable time" requirement, and were therefore in breach of Article 6.

Article 2 of Protocol 4

The Court stated that the fact that the applicants were subjected to an obligation to seek permission from the court to leave their place of residence every time they wished to go elsewhere amounted to an interference with their right to freedom of movement.

With regards to whether this interference was "in accordance with the law", the Court reiterated that it is primarily for national authorities to resolve problems of interpretation of domestic legislation. The Court further reiterated its role was confined to ascertaining whether the effects of such interpretation were compatible with the Convention, particularly in relation to procedural rules. In the present case, the applicants sought to challenge the implementation of the measure rather than its lawfulness and the Court saw no reason to question the domestic court's finding that its application was compatible with domestic procedural law and that it pursued legitimate aims such as the maintenance of public order and prevention of crime.

With regards to the proportionality of the interference, the Court observed it had previously found disproportionate lengthy durations of restrictions not to leave one's place of residence in several cases against Italy[758]. However, the circumstances of the instant case were sufficiently different to enable it to be distinguished. Firstly, the Court noted that the applicants were the subject of criminal proceedings in the present case. The Convention permits States, in some circumstances, to apply measures restricting liberty in order to ensure efficient conduct of criminal prosecution. The Court reiterated that, in such cases, an obligation not to leave an area of residence is a proportionate restriction on the accused's liberty.

Secondly, the preventative measures were not automatically applied for the whole duration of the criminal proceedings against the applicants, and there was no indication that two of the applicants were ever subjected to the measure after July 2002. Thirdly, the length of the restrictions in the instant case were significantly shorter than in the cases against Italy referenced above: five years and three months compared to fourteen years and eight months for example.

In order to decide whether a fair balance was struck between the general interest and proper conduct of the criminal proceedings and the applicants' enjoyment of freedom of movement, the Court had to ascertain whether the applicants had actually sought to leave their area of residence and, if so, whether permission to do so was refused. The Government submitted, unchallenged by the applicants, that one of the applicants had applied twice to leave Kyiv and was granted permission on both occasions.

[758] *Luordo v. Italy*, judgment of 17 July 2003, no. 32190/96; *Goffi v. Italy*, judgment of 24 March 2005, no. 55984/00; *Bassani v. Italy*, judgment of 11 December 2003, no. 47778/99.

The Court therefore found that the restrictions on the applicants' freedom of movement were proportionate and that there was no violation of Article 2 of Protocol 4.

Article 41

The Court awarded €2,000 each to two of the applicants, and €3,000 to one applicant for non-pecuniary damages. Each received €1,000 for costs and expenses.

Fourteen-day orders prohibiting the applicants, who were engaged in drug-related activities, from entering "emergency areas" in Amsterdam did not violate Article 2 of Protocol 4

73. JUDGMENTS IN THE CASES OF (1) OLIVIEIRA v. THE NETHERLANDS AND (2) LANDVREUGD v. THE NETHERLANDS

(Application nos. 33129/96 and 37331/97)
4 June 2002

1. Principal facts

The applicants, Hans Walter Olivieira (1) and Franklin Edgar Landvreugd (2), were both Netherlands nationals. On 6 November 1992 and 2 December 1994 respectively, the Burgomaster of Amsterdam imposed prohibition orders, banning each applicant from entering "emergency areas" of the city, so-called due to high levels of public trafficking and use of hard drugs, for fourteen days. The orders were imposed because they had been found in these areas either in possession of hard drugs or drug-related utensils, or were openly using drugs. Neither applicant lived or worked in the prohibited areas. Both were convicted and sentenced for failing to comply with their prohibition orders, though these criminal proceedings did not form part of the case before the Court.

2. Decision of the Court

The applicants complained that the fourteen-day prohibition orders violated their rights to freedom of movement as protected by Article 2 of Protocol 4.

Article 2 of Protocol 4

The Government did not dispute there had been a restriction of the applicants' rights under Article 2 of Protocol 4.

The Court hence considered whether the restrictions were "in accordance with the law". It reiterated this not only required that the measures should have a basis in domestic law, but also that they should be accessible to the persons concerned and foreseeable as to their effects.

The Court noted that the Municipality Act, as in force at the relevant times, stipulated the Burgomaster had discretionary power to issue orders as necessary to secure public order. Moreover, both the Supreme Court and Administrative Jurisdiction Division of the *Raad van State* (for applicant 1) or Council of State (for applicant 2) found the Municipality Act constituted a sufficient legal basis for restrictions on freedom of movement of the kind at issue. The Court further emphasised it was primarily for national authorities, courts particularly, to interpret and apply national law. The Court therefore found the prohibition orders had a basis in domestic law.

The Court found the accessibility requirement satisfied because the provisions used were laid down in the Municipality Act, and the case-law concerning their interpretation was published in domestic law reports.

The Court then reiterated that a rule is "foreseeable" if it is formulated with sufficient precision to enable an individual – if need be with appropriate advice – to regulate his conduct by it. Though the Court noted that the relevant sections of the Municipality Act were rather general, it recognised that the circumstances which called for the Burgomaster to issue orders deemed necessary for public order were too diverse to accurately formulate a law to cover every eventuality. The Court further noted that, previously, both applicants were each given eight-hour prohibition orders on six different occasions, none of which either applicant challenged as unlawful. Subsequently, both applicants were then told they would each be issued with a fourteen-day prohibition order if they committed the offending acts in the near future. It was after both applicants neglected this warning and were again issued with eight-hour prohibitions that the Burgomaster did in fact then issue fourteen-day prohibitions. The Court stated that, from the above sequence of events, the applicants were able to foresee the consequences of their acts and regulate their conduct accordingly before the fourteen-day prohibition orders were imposed. The Court also took into consideration the fact the applicants could, and indeed did, institute objection proceedings and file appeals with the *Raad van State* (applicant 1) or the Council of State (applicant 2). Consequently, adequate safeguards were afforded against abuse of the Burgomaster's discretionary powers. Therefore, the Court considered the fourteen-day prohibitions to be foreseeable, and therefore in accordance with the law.

The Court then considered whether the prohibitions were "justified by the public interest in a democratic society". The prohibition orders were applied in areas of Amsterdam where emergency situations existed in respect of trafficking and the use of hard drugs in public, as established by national courts. The orders therefore pursued the legitimate aims of maintenance of public order and prevention of crime. The Court took into account: that the applicants had already been issued with several eight-hour prohibition orders, but nevertheless returned each time to the prohibited areas to engage in hard drug activities in public; that they were warned that a further repeat would result in fourteen-day orders; that neither lived or worked in the respective prohibited areas; that provision had been made for applicant 2 to enter the area with impunity to collect his social security benefits and mail from a charity which was assisting him. Therefore, the Court stated the restrictions on the applicants' freedom were justified and proportionate.

The Court concluded there had been no violation of Article 2 of Protocol 4.

Article 8

The Court stated that, since the applicants' complaints under Article 8 essentially coincided with those under Article 2 of Protocol 4, no separate issue arose under Article 8.

Travel ban on former prisoner violated Article 2 of Protocol 4 and Article 13 as the national authorities failed to consider its proportionality and the applicant's individual circumstances

74. JUDGMENT IN THE CASE OF MILEN KOSTOV v. BULGARIA

(Application no. 40026/07)
3 September 2013

1. Principal facts

The applicant was a Bulgarian and Greek national. Having served a two-year prison sentence, he was released in 2003. On 30 September 2005 the Varna Regional Police Directorate ("the VRPD") imposed a travel ban on the applicant because of his previous conviction and the fact his statutory period for legal rehabilitation had not yet expired. At the time when the order was issued, the applicant was living in Germany. He travelled to Bulgaria in early April 2006 to renew his identity papers.

The applicant appealed the ban, but this was dismissed by the Supreme Administrative Court ("the SAC") in a final judgment on 22 February 2007. The SAC held that the personal circumstances of the applicant should not have been examined by lower courts, as the VRPD's discretion in issuing the order was not subject to judicial control. In May 2007, the applicant requested that the ban be lifted, which was duly granted on the grounds of his rehabilitation.

2. Decision of the Court

The applicant complained the travel ban was neither necessary nor proportionate in the circumstances, and therefore violated his right to leave Bulgaria as protected by paragraph 2 of Article 2 of Protocol 4. He further complained that his rights under Article 13 and Article 6 were violated as, respectively, he had no effective domestic remedy in relation to his first complaint and the SAC refused to examine proportionality.

Article 2 of Protocol 4

The Court noted the circumstances of this case were very similar to recent cases put before it, in all of which it had found breaches of Article 2 of Protocol 4.

It noted that the authorities only referred to the applicant's conviction and lack of rehabilitation when imposing the travel ban. In doing so, the authorities failed to take into consideration the applicant's individual situation or the proportionality of the measure.

Moreover, the Court highlighted this failure could not be rectified through judicial review proceedings due to the SAC's findings that lower courts could not review the manner in which the VRPD had exercised their discretion in imposing the ban.

The Court reiterated that such a rigid and automatic approach could not be reconciled with Article 2 of Protocol 4 to ensure that any interference with an individual's right to leave their country, from the outset and throughout its duration, was justified and proportionate in the circumstances.

Therefore, the Court held there had been a violation of Article 2 of Protocol 4.

Article 13 in conjunction with Article 2 of Protocol 4

The Court reiterated that, where there is an arguable claim that an act of the authorities may infringe upon an individual's right to leave their country, Article 13 requires that the national legal system makes it possible to challenge the measure. In doing so, the relevant issues must be examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum, offering adequate guarantees of independence and impartiality. As there was no doubt that the applicant's complaint under Article 2 of Protocol 4 was arguable, he was entitled to an effective complaint procedure in Bulgarian law.

The Court also reiterated that a domestic appeals procedure cannot be considered effective within the meaning of Article 13 unless it affords a possibility to deal with the substance of an arguable complaint and to grant appropriate relief.

Though Bulgarian law provided a possibility to seek judicial review, the Court noted the complaint's 'substance' was not addressed, as the SAC was only concerned with the formal lawfulness of the ban. Once satisfied the applicant had in fact been convicted and not rehabilitated, the SAC automatically confirmed the travel ban, quashing the lower court's finding that the ban had not been sufficiently reasoned. The applicant's right to respect for his private and family

life was held irrelevant, and there was no consideration of proportionality, namely whether there was a fair balance between public interest and the applicant's rights. Moreover, the applicant did not have any other effective remedy in Bulgarian law.

Therefore, the Court held there had been a violation of Article 13 in conjunction with Article 2 of Protocol 4.

Article 6

The Court considered that given the above findings no separate issues arose under Article 6.

Article 41

The Court awarded €2,000 to the applicant in respect of non-pecuniary damages, and €1,146.65 for legal costs and expenses.

Complaint under Article 3 of Protocol No. 4 involving a permanent ban from French territory on a French citizen declared inadmissible as the authorities had acknowledged the violation and taken necessary measures

75. DECISION IN THE CASE OF OUDRHIRI V. FRANCE

(Application no. 19554/92)
31 March 1993

1. Principal facts

The applicant was a French national, born in Morocco in 1953 who lived in Cercy, France. He was granted French nationality in February 1983 after marrying a French national.

In March 1990 the applicant was convicted of drug-related offences by the Criminal Court of Pontoise and sentenced to 8 years' imprisonment as well as a permanent ban from all French territory. In the detention order issued by the investigating judge, it was stated that the applicant was of French nationality.

The applicant appealed against this decision to the Court of Appeal, which upheld his conviction, added a penalty fine and revoked the period of probation he had previously been allowed.

The applicant appealed the decision to revoke the probationary period to the Cour de Cassation, on the grounds of inadequate reasons and absence of legal basis. The Cour de Cassation rejected this appeal in July 1991. The applicant did not raise the issue of the permanent ban from all French territory which had been imposed on him, as he was advised in a letter from his lawyer that the Criminal Chamber of the Cour de Cassation did not examine questions of fact, meaning the issue of the ban fell outside the Cour de Cassation's competence.

2. Decision of the Court

The applicant argued that the permanent ban against his entry onto French territory violated his rights under Article 3 of Protocol No. 4 of the Convention, the prohibition of expulsion of nationals. The applicant also complained of inadequate reasons, absence of a legal basis, false charges and witness tampering which the Commission examined under Article 6 § 1.

Article 3 of Protocol No. 4

The Commission acknowledged that the Government knew the applicant was a French national. The Government further admitted before the Commission that banning a French national applicant from French territory was illegal under French law. The Government expressed its intention to end the violation of the applicant's rights under French law by cancelling the ban placed on the applicant, and confirmed that the Minister of Justice had already instructed the Attorney-General not to enforce the ban against the applicant, after he completed his time in custody.

The Commission held therefore that the Government had taken the necessary measures to remedy the violation by cancelling the ban and giving instructions not to execute it. As such, the Commission considered that the applicant could not claim to be victim of a violation of the Convention within the meaning of Article 25 (now Article 34).

Article 6 § 1

The Commission held that there was no appearance of a violation and that it was not competent to examine any errors of fact in this case, and held this part of the application to be manifestly ill-founded.

XIII. Discrimination

Refusal of a residence permit to a foreigner because he was HIV-positive was discriminatory, violating Article 14 taken in conjunction with Article 8

76. JUDGMENT IN THE CASE OF KIYUTIN v. RUSSIA

(Application no. 2700/10)
10 March 2011

1. Principal facts

The applicant was a national of Uzbekistan who had lived in the Oryol region of Russia since 2003. He married a Russian national in July 2003 and had a daughter with her in 2004.

Meanwhile, in August 2003, the applicant applied for a Russian residence permit, which required him to undergo a medical examination, during which he tested positive for HIV. His application for a residence permit was refused due to a legal provision which prevented the issuing of residence permits to HIV-positive foreigners. He challenged this refusal, arguing the authorities should have accounted for his overall health status and family ties in Russia. Domestic courts rejected his appeals, citing the same provision.

2. Decision of the Court

The applicant complained under Articles 8, 13, 14 and 15 that the refusal to grant him a residence permit had been disproportionate to the legitimate aim of the protection of public health and had disrupted his family life, though the Court decided to examine this under Article 14 taken in conjunction with Article 8.

Article 14 in conjunction with Article 8

The Court reiterated that Article 14 has no independent existence and can only be invoked in conjunction with other substantive provisions.

It further reiterated that the right of a foreigner to enter or settle in a particular country was not guaranteed by the Convention, and there was no obligation under the Convention to respect a couple's choice of matrimonial residence. However,

the concept of "family life" includes the relationships that arise from lawful and genuine marriages such as that of the applicant, with his Russian spouse and their child. Therefore, the case fell within the ambit of Article 8.

Article 14 does not prohibit all differences in treatment but only those based on an identifiable, objective or personal characteristic, or "status", by which persons are distinguishable from one another. It contains a non-exhaustive list of factors that constitute "status", which includes the category "any other status". This has been given a wide meaning, for example the Court has recognised a physical disability and various health impairments as falling within its scope. It also noted that the United Nations Commission on Human Rights interpreted "other status" in non-discrimination provisions to cover health status, including HIV-infection.

Accordingly, the Court considered that a distinction made on account of one's health status, including such conditions as HIV infection, should be covered by the term "other status" in Article 14. Therefore Article 14 taken in conjunction with Article 8 was applicable as a result.

The Court re-iterated that discrimination meant treating differently, without an objective and reasonable justification, persons in analogous or relevantly similar situations. Being the spouse of a Russian national and father of a Russian child, the applicant was in an analogous situation to that of other non-nationals who sought to obtain a family-based residence permit in Russia. The Court stated the applicant had been treated differently due to a legal provision which stated that foreigners' applications for residence permits should be refused if they tested HIV-positive.

The Court reiterated that, once the applicant had demonstrated a difference in treatment, it was for the Government to show this difference was justified in the sense it: pursued a legitimate aim, and that the relationship between the means employed and aims sought was proportionate. Though States enjoy a margin of appreciation in their application of these criteria, the Court stated this was substantially narrowed in this case. Firstly, individuals living with HIV represented a vulnerable group, which has suffered considerable discrimination in the past. Secondly, the Court emphasised only six out of forty-seven Council of Europe member states required negative HIV results as a pre-condition for granting a residence permit, whilst the remainder did not impose any restrictions on the entry, stay or residence of individuals on account of HIV status. These two factors meant the Government had to demonstrate very weighty reasons for its restriction.

The Court accepted that travel restrictions are instrumental for the protection of public health, but emphasised this only applied to highly contagious diseases with short incubation periods such as cholera, yellow fever, SARS and "bird flu" (H5N1), as individuals may, by their very presence in a country through casual contact or airborne particles, transmit such diseases. The Court distinguished these diseases from HIV, stating that the mere presence of an HIV-positive individual in a country was not in itself a threat to public health, as it is not transmitted casually but through specific interactions, including sexual intercourse and the sharing of syringes. Therefore, the exclusion of HIV-positive non-nationals from entry and/or residence to prevent HIV transmission was based on a generalised assumption, not founded in fact or individual circumstance, that non-nationals were likely to engage in such specific and unsafe behaviour.

Moreover, the Court noted that methods for HIV transmission remained the same irrespective of the duration of individuals' stay in Russia or their nationality. Despite this, HIV-related travel restrictions were not imposed on tourists or short-term visitors, or on Russian nationals returning to Russia. It could not be concluded, nor did the Government give any evidence for, that such individuals being more likely than non-national long-term settlers to engage in safer behaviour, which would reduce the risk of HIV transmission. The Court also noted that tests would not identify all HIV-positive foreigners if newly infected people were tested during the period when the virus had not manifested itself.

The Court accepted that, objectively, differential treatment of HIV-positive long-term settlers as opposed to short term visitors might be justified by a greater risk the former would become a serious finance burden on the public-health care system. However, this was not valid in the applicant's case because non-nationals had no entitlement to free medical assistance, except for emergency treatment, in Russia.

Therefore, the Court found that, though protection of public health was a legitimate aim, there was no compelling justification to show this was achieved by such selective restrictions on non-nationals seeking residence.

The Court noted a further concern as to the blanket and indiscriminate nature of the impugned measure and a related provision, which envisaged the deportation of non-nationals found to be HIV-positive. Neither left any room for individualised assessment based on the facts of a particular case. Though the Constitutional Court indicated in a decision on 12 May 2006 that these

provisions did not exclude the possibility of residence permits being granted on humanitarian grounds in exceptional cases, it was not clear whether this gave domestic authorities discretion to override the impugned measure. In the applicant's case, the authorities gave no heed to this decision, expressly stating that courts were not obligated to have regard to humanitarian considerations. The Court considered that such indiscriminate refusal of a residence permit, solely based on a health condition, and without individualised judicial evaluation, could not be considered compatible with Article 14.

Therefore, the Court concluded the applicant had been a victim of discrimination on account of his health status, in violation of Article 14 in conjunction with Article 8.

Article 41

The Court awarded €15,000 to the applicant in respect of non-pecuniary damages, and €350 for costs and expenses.

The AIRE Centre

The AIRE Centre is a specialist non-governmental organisation that promotes the implementation of European Law and supports the victims of human rights violations. Its team of international lawyers provides expertise and practical advice on European Union and Council of Europe legal standards and has particular experience in litigation before the European Court of Human Rights in Strasbourg, where it has participated in over 150 cases.

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KONRAD ADENAUER STIFTUNG
RULE OF LAW - SOUTH EAST EUROPE

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