# Academy of European Law

# THE RIGHTS OF PEOPLE WITH DISABILITIES

# IN CRIMINAL PROCEEDINGS: ECHR & CRPD

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# THE RIGHTS OF PEOPLE WITH DISABILITIES IN CRIMINAL PROCEEDINGS: ECHR & CRPD

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## §1– INTRODUCTION

There is relatively little European Convention case law concerning the specific rights of persons with a disability in criminal proceedings, aside from cases about the conditions in which detainees with disabilities are held. There is therefore an opportunity for the United Nations and CRPD agencies to devise realistic protections that improve the existing situation.

The material in this handout is set out under the following headings:



## §2– THE MAIN ECHR ARTICLES AND CRPD EQUIVALENTS

The relevant ECHR articles and their CRPD equivalents are dealt with in detail in the main paper:

- *Eldergill, European Convention on Human Rights, the UNCRPD and the Legal Rights of Citizens Suffering Mental Ill-health*

However, it may help delegates to set out the main provisions here with a brief explanation of their relevance.

### ECHR ARTICLE 6 (RIGHT TO A FAIR TRIAL) AND CRPD ARTICLES 12 AND 13

The fair trial provisions in Article 6 of the European Convention cover not only the court process but matters such as the charging of an individual and access to legal assistance in a police station.

***Article 6 of the Convention – Right to a fair trial***

*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.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3. *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.*

The key principle governing the application of Article 6 is fairness.[1] The requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6.[2]

**CRPD Article 13**

Article 13 (Access to Justice) provides as follows:

***Article 13 Access to justice***

*1.States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*

*2.In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.*

1 Gregačević v. Croatia, no. 58331/09, 10 July 2012, §49.

2 Moreira Ferreira v. Portugal (no. 2) [GC], no. 19867/12, 11 July 2017, §67; Carmel Saliba v. Malta, no. 24221/13, 29 November 2016, §67.

**CRPD Article 12**

Article 12 has proved controversial in the context of serious mental disabilities because it includes the statement that, 'States Parties shall recognize that persons with disabilities enjoy legal capacity *on an equal basis* with others in all aspects of life'.

Some commentators and agencies have interpreted the 'equal legal capacity' provision as meaning that defendants who are disabled by acute mental illness must or should be tried and sentenced on the same basis as other defendants.

If that approach was ever adopted by state parties, it would have significant repercussions in terms of subjecting people who are acutely mentally ill to inhuman or degrading treatment, unfair trial and unjust sentences. Suicide and self-harm rates would be likely to increase substantially.

***Article 12***

***Equal recognition before the law***

*1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*

*2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*

*3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*

*4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*

*5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

## ECHR ARTICLE 2 (RIGHT TO LIFE) AND CRPD ARTICLE 10

Article 2 provides that everyone's right to life shall be protected by law. It is particularly relevant to prison and police station conditions.

> ***ARTICLE 2***
>
> ***Right to life***
>
> *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.*

## CRPD Article 10

Article 10 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) is cast in similar terms:

> '10. *States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.'*[3]

## The positive obligation under Article 2

Under Article 2, state agents are obliged to refrain from acts or omissions of a life-threatening nature or which place the health of individuals at grave risk.[4] Without Convention-compliant justification, they must not use lethal force or force which, while not resulting in death, gives rise to serious injury. However, states also have positive obligations under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction.[5]

Persons in custody are in a vulnerable position and the authorities are under a duty to protect them.[6] An issue may arise under Article 2 where it is shown that the authorities of a contracting state have put a person's life at risk through the denial of health care which they have undertaken to make available to the population in general.[7]

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3 The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

4 İlhan v Turkey [GC], no. 22277/93, 27 June 2000. In the absence of any indication to the contrary the cited text is a judgment on the merits delivered by a Chamber of the court.

5 Cyprus v Turkey [GC], no. 25781/94, 10 May 2001, §219; LCB v the United Kingdom, judgment of 9 June 1998, Reports 1998-III, p140, §36.

6 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242, §91; Younger v United Kingdom (dec), no. 57420/00, ECHR 2003-I; Trubnikov v Russia, no. 49790/99, 5 July 2005, §68.

7 Cyprus v Turkey [GC], supra, §219; Nitecki v Poland (dec), no. 65653/01, 21 March 2002; Oyal v Turkey, no. 4864/05, 23 March 2010.

Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources.[8]

## ECHR ARTICLE 3 (INHUMAN OR DEGRADING TREATMENT) AND CRPD ARTICLE 15

Article 3 of the European Convention prohibits torture and inhuman or degrading treatment or punishment. As with Article 2, it is particularly relevant to prison and police station conditions, but also to matters such as interrogation.

> ***ARTICLE 3***
>
> ***Prohibition of torture etc***
>
> *No one shall be subjected to* torture *or to inhuman or degrading treatment or punishment.*

Article 3 is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.[9] The court has often stated that it must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe.

### 'Ill-treatment'

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 level is, in the nature of things, relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and sometimes the victim's sex, age and state of health.[10]

Although the purpose of such treatment is a factor, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3.[11]

The distinction between torture and other types of ill-treatment is to be made on the basis of a difference in the intensity of the suffering inflicted. Ill-treatment that is not torture, because it does not have sufficient intensity or purpose, will be classed as 'inhuman or degrading'. As with all Article 3 assessments, the assessment of this minimum is relative.

### 'Degrading treatment'

'Degrading treatment' is that which arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. It has also been described as involving treatment such as would lead to breaking down the physical or moral resistance of the victim[12] or drive them to act against their will or conscience.[13]

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8 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242, §90; Taïs v France, no. 39922/03, 1 June 2006, §97.

9 Chahal v United Kingdom, no. 22414/93, 15 November 1996, Reports 1996-V, §79, [1996] ECHR 54.

10 Ireland v United Kingdom, no. 5310/71, 18 January 1978, Series A no. 25, [1978] ECHR 1, (1978), 2 EHRR 25, §162; Kudla v Poland [GC], no. 30210/96, 26 October 2000, §91; Peers v Greece, no. 28524/95, §67.

11 Peers, supra, §74.

12 Ireland v the United Kingdom, Ireland v United Kingdom, no. 5310/71, 18 January 1978, Series A no. 25, [1978] ECHR 1, (1978), 2 EHRR 25, §167.

13 *The Greek Case*, nos. 3321-3/67, 1969.

**The positive obligation under Article 3**

In general terms, the Convention does not confer a right to a particular standard of medical service or access to medical treatment in any particular country.[14] Nor does it guarantee to any individual a right to receive medical care which if given would exceed the standard level of health care available to the population generally.[15]

The court will, however, have regard to legal and policy materials relating to healthcare which have been adopted within the framework of the Council of Europe. The case law refers to the recommendations of the Committee of Ministers in the health sector,[16] as well as to conventions such as the Oviedo Convention[17] and the Council of Europe Convention,[18] and the European Social Charter on health-related issues.[19] Such conventions and charters enable the court to assess the margin of appreciation enjoyed by contracting states and to set baseline standards compatible with the human rights of individuals. In effect, therefore, there is no guarantee to high quality healthcare or to a particular treatment but in certain circumstances a minimum standard of healthcare is guaranteed.

Under Article 3, the state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility.

There is a particular need for states to take such measures in the context of psychiatric hospitals, where patients are typically in a position of inferiority and helplessness.[20] Prison detainees are also in a special situation because of their dependence on the authorities when it comes to their living conditions, including access to medical care. In addition, the fact that they are deprived of their liberty means that any acts and omissions of the authorities are likely to have a greater impact on their psychological well-being. The state must ensure that detainees are held in conditions which are compatible with respect for human dignity. It must also ensure that the manner and method of execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured through requisite medical assistance.[21] Diagnosis and care in detention facilities, including prison and psychiatric hospitals, should be prompt and accurate. Where necessitated by the person's medical condition, supervision should be regular and involve a comprehensive therapeutic strategy aimed at ensuring the detainee's recovery or at least preventing a deterioration of their condition.[22] In order to determine whether these requirements have been met, the court will thoroughly examine, in the light of the particular allegations, whether the authorities have followed the medical advice and recommendations.[23]

14 Wasilewski v Poland (dec), no. 32734/96, 20 April 1999.
15 Nitecki v Poland (dec), no. 65653/01, 21 March 2002; Kaprykowski v Poland, no. 23052/05, 3 February 2009, [2009] ECHR 198, §75.
16 Biriuk v Lithuania, no. 23373/03, 25 November 2008, §21.
17 Glass v United Kingdom, no. 61827/00, 9 March 2004, [2004] ECHR 102, (2004) 39 EHRR 15; Vo v France [GC], no. 53924/00, 8 July 2004, §§ 35 and 84.
18 S and Marper v the United Kingdom [GC], nos. 30562/04 and 30566/04, 4 December 2008.
19 Zehnalova and Zehnal v the Czech Republic, no. 38621/97, 14 May 2002; Mółka v Poland (dec), no. 56550/00, 11 April 2006.
20 See e.g. Herczegfalvy v Austria, no. 10533/83, Series A no. 244, [1992] ECHR 58, (1992) 15 EHRR 437 (the 'Herczegfalvy case').
21 Kudła v Poland [GC], no. 30210/96, 26 October 2000, §94.
22 Pitalev v Russia, no. 34393/03, 30 July 2009, §54.
23 Vladimir Vasilyev v Russia, no. 28370/05, 10 January 2012, §59; Center of Legal Resources on behalf of Valentin Câmpeanu v Romania (GC), no. 47848/08, 17 July 2014.

**CRPD Article 15**

Article 15 of the UNCRPD (Freedom from torture or cruel, inhuman or degrading treatment or punishment) is cast in similar terms to Article 3 of the ECHR but adds the word 'cruel':

> *'1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment …*
>
> *2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.*

## ECHR ARTICLE 8 (RIGHT TO RESPECT FOR PRIVATE LIFE, ETC) AND CRPD ARTICLE 22

Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence. It is particularly relevant to matters such as searches, fingerprinting, surveillance and the retention of information about a suspect or offender. It will also be relevant to the imposition of bail, parole or licence conditions.

> ***ARTICLE 8***
>
> ***Right to respect for private and family life***
>
> *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 well-being 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.*

There must be no interference by a public authority with the exercise of Article 8 rights unless the interference is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article 8.

The term 'private life' is a broad term not susceptible to exhaustive definition.[24] However, Article 8 'secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his or her personality'.[25] It protects the moral and physical integrity of the individual, including the right to live privately away from unwanted attention.[26]

While Article 8 contains no explicit procedural requirements, 'the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8'.[27] The extent of the state's margin of appreciation turns partly on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism.[28]

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24 Peck v United Kingdom, no. 44647/98, 28 January 2003, (2003) 36 EHRR 41, [2003] ECHR 44, §57.

25 Sidabras v Lithuania, nos. 55480/00 and 59330/00, 27 July 2004, (2006) 42 EHRR 6, §43; Brüggeman v Germany, no. 6959/75, 12 July 1977, (1981) 3 EHRR 244, §55.

26 X and Y v Netherlands, no. 8978/80, 26 March 1985, (1985) 8 EHRR 235, [1985] ECHR 4, §§22–27.

27 Shtukaturov v Russia, supra, §89; Görgülü v Germany, no. 74969/01, 26 February 2004, §52.

28 Shtukaturov v Russia, supra, §89; Sahin v Germany, no. 30943/96, 11 October 2001, §§46 et seq.

The issue of proportionality (the interference must be 'necessary in a democratic society') is a consistent theme in case law. When considering whether an interference is proportionate, the burden lies on the state to justify its action. The 'proportionality' test entails assessing whether a measure is necessary for the achievement of the legitimate aim and, if so, whether it fairly balances the rights of the individual with those of the whole community.

**The positive obligation**

Article 8 gives rise to both negative and positive obligations. States are under a positive obligation to secure the right to effective respect for physical and psychological integrity.[29] This obligation may require the state to take measures to provide effective and accessible protection of the right to respect for private life,[30] through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures.[31]

**Criminal proceedings**

All criminal proceedings entail certain consequences for the private life of an individual who has committed a crime. These are compatible with Article 8 of the Convention provided that they do not exceed the normal and inevitable consequences of such a situation.[32]

The storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of Article 8, especially where such information concerns a person's distant past.[33]

**CRPD Article 22 (Respect for privacy)**

Article 22 of the CRPD is concerned with respect for privacy:

> '*1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.*
>
> *2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.*

**ARTICLE 5 (DEPRIVATION OF LIBERTY) AND CRPD ARTICLE 14**

Article 5 is particularly relevant in criminal cases concerning people with are suffering from significant mental health problems and it covers detention on the ground of 'unsoundness of mind'. Article 14 is the CRPD equivalent.

29 Sentges v Netherlands (dec), no. 27677/02, 8 July 2003; Pentiacova and Others v Moldova (dec) no. 14462/03, 4 January 2005; Nitecki v Poland (dec), no. 65653/01, 21 March 2002.

30 Airey v Ireland, no. 6289/73, 11 September 1979, (1979) 2 EHRR 305, [1979] ECHR 3, §33; McGinley and Egan v United Kingdom, nos. 10/1997/794/995-996, 9 June 1998, [1998] ECHR 51, §101; Roche v United Kingdom, no. 32555/96, 19 October 2005, [2008] ECHR 926, (2006) 42 EHRR 30, §162.

31 Tysiąc v Poland, supra, §110.

32 Jankauskas v. Lithuania (no. 2), no. 50446/09, 27 June 2017, §76.

33 Rotaru v. Romania [GC], 28341/95, 4 May 2000, §§ 43-44.

The special protections associated with Article 5(1)(e) must be observed where the justification for a person's detention — whether during criminal proceedings or in pursuance of a court-imposed sentence committing the person to hospital — is 'unsoundness of mind', rather than e.g. punishment or a need to remand the person in custody because of a risk of further offending or of absconding.

Article 5 also confers certain other rights on all persons involved in criminal proceedings, such as the right to be told the reasons for one's arrest and the right of an arrested person to be brought promptly before a judge.

> ***Article 5 of the Convention – Right to liberty and security***
>
> *'1. Everyone has the right to liberty and security of person. 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; ….*
>
> *2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*
>
> *3. 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.*
>
> *4. 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.*
>
> *5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'*

The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty (*S, V and A v Denmark* [GC], § 73; *McKay v the United Kingdom* [GC], § 30).

The state is under a positive obligation not only to refrain from actively infringing the rights in question, but also to take appropriate steps to protect everyone within its jurisdiction from any unlawful interference with these rights (*El-Masri v the former Yugoslav Republic of Macedonia* [GC], § 239).

**When is deprivation of liberty on the ground of unsoundness of mind 'lawful'**

The leading case is ***Winterwerp v The Netherlands***.[34] In that case, the court set down four conditions that must be satisfied for a person's detention on the basis of unsoundness of mind to be lawful under Article 5§1(e):[35]

1. **The deprivation of liberty must be lawful.**

   Lawfulness presupposes conformity with domestic law and the Convention.

   As regards the conformity with the domestic law, the term 'lawful' covers procedural as well as substantive rules.

   Domestic law must be in conformity with the Convention, including the general principles expressed or implied by it.[36] The general implied principles to which the Article 5§1 case law refers are the principle of the rule of law and, connected to this, the principles of legal certainty, proportionality and protection from arbitrariness, which is the very aim of Article 5.[37] A deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention.[38]

   As concerns the principle of legal certainty, the Convention requires that the law is sufficiently clear and precise. It is essential that the conditions for a deprivation of liberty under domestic law are clearly defined and that the law foreseeable in its application, so that so that a person may know to a degree that is reasonable in the circumstances the consequences which a given action may entail, if need be by taking appropriate advice.[39]

   The essential objective of Article 5 is to prevent citizens from being deprived of their liberty abritrarily.[40]

   No detention that is arbitrary can ever be regarded as 'lawful'. If there are no procedural rules, no criteria, no statement of purpose, no time limits or treatment, and no requirement for continuing clinical assessment, then there is nothing in the law to protect the individual against the arbitrary deprivation of liberty.

   Arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the detention do not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5§1; where there is no connection between the ground relied on and the place and

34 Winterwerp v Netherlands, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR 387.

35 See Winterwerp v Netherlands, supra, §39. The four conditions were confirmed in Stanev v Bulgaria [GC], no. 36760/06, 17 January 2012, [2012] ECHR 46, §145; DD v Lithuania, no. 13469/06, 14 February 2012, [2012] ECHR 254,§156; Kallweit v Germany, no. 17792/07, 13 January 2011, §45; Shtukaturov v Russia, no. 44009/05, 27 March 2008, 54 EHRR 962, §114; Varbanov v Bulgaria, no. 31365/96, ECHR 2000-X, §45.

36 Plesó v Hungary, no. 41242/08, 2 October 2012, §59.

37 Simons v Belgium (dec), no. 71407/10, 28 August 2012, §32.

38 Creangă v Romania, supra, §84; A and Others v the United Kingdom [GC], no. 3455/05, 19 February 2009, §164.

39 See e.g. Del Río Prada v Spain [GC], no. 42750/09, 21 October 2013, ECHR 2013, §125; Creangă v Romania [GC], no. 29226/03, 23 February 2012, §120; Medvedyev and Others v France [GC], no. 3394/03, 29 March 2010, ECHR 2010, §80.

40 See e.g. Witold Litwa v Poland, no. 26629/95, 4 April 2000, ECHR 2000-III, §78.

conditions of detention; and where there is no proportionality between the ground of detention relied on and the detention in question.[41]

The speed with which the domestic courts replace a detention order which has expired or has been found to be defective is a further relevant element in assessing whether a person's detention must be considered arbitrary.[42]

The absence or lack of reasoning in detention orders is another element taken into account by the court when assessing lawfulness under Article 5§1.[43]

In terms of the principle of proportionality, the authorities should consider less intrusive measures than detention.[44]

As regards the relationship between the ground relied upon and the place and conditions of detention, in principle the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.[45]

However, where the circumstances justify it, a person may be placed temporarily in an establishment not specifically designed for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.[46]

**2. Except in emergency cases, the individual concerned must be reliably shown to be of 'unsound mind', that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.**

The very nature of what has to be established before the competent national authority — a true mental disorder — calls for objective medical expertise. Except in an emergency, no deprivation of liberty of a citizen considered to be of unsound mind is in conformity with

41 See James, Wells and Lee v the United Kingdom, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012, §§191-95; Saadi v the United Kingdom [GC], no. 13229/03, 29 January 2008, §§68-74.

42 Mooren v Germany [GC], no. 11364/03, 9 July 2009, §80. Thus, in the context of sub-paragraph (c), the court considered that a period of less than one month between the expiry of the initial detention order and the issue of a fresh, reasoned detention order following a remittal of the case from the appeal court to a lower court did not render the applicant's detention arbitrary: Minjat v Switzerland, no. 38223/97, 28 October 2003, §§46 and 48. In contrast, a period of more than a year following a remittal from a court of appeal to a court of lower instance was found to render the applicant's detention arbitrary: Khudoyorov v Russia, no. 6847/02, 8 November 2005, ECHR 2005-X (extracts), §§ 136-37.

43 The absence of any grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5§1: Stašaitis v Lithuania, no. 47679/99, 21 March 2002, §§66-67. Likewise, a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness: Khudoyorov v Russia, supra, §157. What is required is a detention order based on concrete grounds and setting a specific time-limit: Meloni v Switzerland, no. 61697/00, 10 April 2008, §53.

44 Ambruszkiewicz v Poland, no. 38797/03, 4 May 2006, §32.

45 LB v Belgium, no. 22831/08, 2 October 2012, §93; Ashingdane v United Kingdom, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8, §44; OH v Germany, no. 4646/08, 24 November 2011, §79.

46 Pankiewicz v Poland, no. 34151/04, 12 February 2008, §§44-45; Morsink v Netherlands, no. 48865/99, 11 May 2004, §§67-69; Brand v Netherlands, no. 49902/99, 11 May 2004, §§64-66.

Article 5§1 (e) if it has been ordered without seeking the opinion of a medical expert.[47] A mental condition must be of a certain gravity in order to be considered as a 'true' mental disorder.[48] The relevant time at which a person must be reliably established to be of unsound mind is the date of adoption of the measure depriving that person of their liberty as a result of that condition.[49]

**3. The mental disorder must be of a kind or degree warranting compulsory confinement.**

In deciding whether an individual should be detained as a person 'of unsound mind', the national authorities have a certain discretion because it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case.[50] The detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate their condition, but also where the person needs control and supervision to prevent them from, for example, causing harm to themselves or others.[51]

**4. The validity of continued confinement depends upon the persistence of such a disorder.**

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant's confinement.[52] However, the continuation of a deprivation of liberty for purely administrative reasons is not justified.[53]

**CRPD Article 14**

Article 14 of the CPRD is concerned with liberty and the security of the person:

***Article 14 Liberty and security of person***

*1. States Parties shall ensure that persons with disabilities, on an equal basis with others:*

*a. Enjoy the right to liberty and security of person;*

*b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.*

*2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.*

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47 Ruiz Rivera v Switzerland, no. 8300/06, 18 February 2014, §59; SR v Netherlands (dec), no. 13837/07, 18 September 2012, §31.

48 Glien v Germany, no. 7345/12, 28 November 2013, §85.

49 OH v Germany, no. 4646/08, 24 November 2011, §78.

50 Plesó v Hungary, no. 41242/08, 2 October 2012, §61; HL v United Kingdom, no. 45508/99, 5 October 2004, ECHR 2004-IX, (2004) 40 EHRR 761, §98.

51 Hutchison Reid v United Kingdom, no. 50272/99, 20 February 2003, ECHR 2003-IV, [2003] ECHR 94, (2003) 37 EHRR 211, §52.

52 Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.

53 RL and M-JD v France, no. 44568/98, 19 May 2004, §129.

# §3– ARREST, CHARGE AND PRE-COURT ISSUES

In almost all jurisdictions, the investigation of an alleged criminal offence will commence with the arrest of a suspect and often then proceed to the individual's detention in a police station, questioning of the individual and charge. At this stage, European Convention and CRPD issues may also arise in relation to surveillance, stops and searches, taking bodily samples, house arrest, the execution of warrants and the seizure and use of records, including medical records.

**ARREST**

Subject to rare exceptions, the arrest of an individual based on a suspicion that they have committed a criminal offence gives rise to a deprivation of liberty, with the result that there must be compliance with Article 5 of the European Convention on Human Rights (ECHR).

**Arrest of persons suffering from mental ill-health or disability**

The arrest of a person suffering from mental ill-health, disability or illness raises critical issues in terms of the effect of arrest and detention on their health, the conditions of detention, access to medical treatment in police custody, diverting people with an active mental illness away from the criminal law system, the fairness of questioning and the risk of false confessions.

State obligations do not only arise on imprisonment. Due consideration must be paid to health issues as soon as a person is taken into police custody. See e.g. ***Jasinskis v. Latvia (2010)***,[54] an Article 2 case involving a 'deaf and mute' arrestee which is dealt with further below:

> *'59 … Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Where the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability (see Price v. the United Kingdom, no. 33394/96, § 30, ECHR 2001-VII, Farbtuhs v. Latvia, no. 4672/02, § 56, 2 December 2004, and international law sources mentioned in paragraphs 39 to 41 above). More broadly, the Court has held that States have an obligation to take particular measures to provide effective protection of vulnerable persons from ill-treatment of which the authorities had or ought to have had knowledge (Z and Others v. the United Kingdom [GC], no. 29392/95, § 73, ECHR 2001-V).'*

**'Arrest' on mental health grounds**

In ***Guenat v Switzerland (1995)***,[55] police officers had invited an individual who had been thought to be acting abnormally to accompany them from his home to a police station. After various unsuccessful attempts to contact doctors at the clinic where the applicant had been receiving treatment, a psychiatrist arranged for his compulsory detention in a mental health hospital. The applicant claimed that he had been arrested arbitrarily and detained for some three hours in the police station without being given any explanation for his arrest. However, the majority of the Commission considered that there had been no deprivation of liberty since the police action had been prompted by humanitarian considerations, no physical force had been used, and the applicant had remained free to walk about the police station.

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54 Jasinskis v. Latvia, no. 45744/08, 21 December 2010

55 Guenat v Switzerland, Commission decision of 10 April 1995 ((1995) DR 81, 130 at 134.

**Giving reasons for a person's arrest**

Article 5(2) of the ECHR requires that, 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.'

The underlying purpose of Article 5(2) is that a person who is arrested must be told why they are being deprived of their liberty. This is an integral part of the scheme of protection afforded by Article 5. It enables the person, if they wish, to apply to a court to challenge the grounds and reasons given and the lawfulness of their detention. This is the right conferred by Article 5(4),[56] and a person in such a situation cannot make effective use of it unless they are promptly and adequately informed of the reasons for the deprivation of liberty.[57]

The detained person must be told the essential legal and factual grounds for their detention in simple non-technical language that they can understand.[58] The reasons do not have to be set out in the text of the decision which authorises the person's detention; nor do they have to be in writing or in any special form.[59] Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features.[60] However, a bare indication of the legal basis for the arrest or detention, taken on its own, is insufficient for the purposes of Article 5(2).[61]

*The ZH Case*

If the relevant person is incapable of receiving the information, the relevant details must be given to the individuals who represent their interests, such as their lawyer or guardian.[62] In ***ZH v Hungary (2012)***,[63] the applicant was a 25 year-old man who was deaf, did not use verbal communication, could not read or write, and had an intellectual disability. His only means of communication was a specific sign language and his mother was the only person who understood him. He was arrested on suspicion of mugging and interrogated at the police station in the sole presence of a sign-language interpreter he said that he was unable to understand. He was then forced him to sign a document to confirm that he understood the charges against him.

The European Court of Human Rights was not persuaded that ZH could be considered to have obtained the information required to enable him to challenge his detention. The condition of a person with intellectual disability must be given due consideration in the process, otherwise it cannot be said that the person has been provided with the requisite information enabling them to make effective and intelligent use of the right of challenge provided by Article 5(4).

56 Fox, Campbell and Hartley v the United Kingdom, no. 12244/86, 30 August 1990, Series A no. 182, 13 EHRR 157, [1990] ECHR 18, §40; Čonka v Belgium, no. 51564/99, 5 February 2002, ECHR 2002-I, [2002] ECHR 14, §50.

57 Van der Leer v the Netherlands, no. 11509/85, 21 February 1990, Series A no. 170-A, [1990] ECHR 3, 12 EHRR 567, §28; Shamayev and Others v Georgia and Russia, no. 36378/02, 12 April 2005, ECHR 2005-III, §413.

58 See e.g. Bordovskiy v Russia, no. 49491/99, 8 February 2005, §56; Nowak v Ukraine, no. 60846/10, 31 March 2011, §63; Gasiņš v Latvia, no. 69458/01, 19 April 2011, §53.

59 X v Germany, Commission decision of 13 December 1978, DR 16; Kane v Cyprus (dec), no. 33655/06, 13 September 2011.

60 Fox, Campbell and Hartley v the United Kingdom, supra, §40.

61 Ibid, §41; Murray v the Netherlands [GC], no. 10511/10, 26 April 2016, §76; Kortesis v Greece, no. 60593/10, 12 June 2012, §§61-62.

62 ZH v Hungary, no. 28973/11, 8 November 2012, §§42-43.

63 ZH v Hungary, no. 28973/11, 8 November 2012.

The court said that it was regrettable that the authorities had not taken any truly 'reasonable steps' – a notion quite akin to that of 'reasonable accommodation' in Articles 2, 13 and 14 of the United Nations Convention on the Rights of Persons with Disabilities – to address his condition, in particular by procuring him assistance by a lawyer or another suitable person. The police officers interrogating the applicant must have realised that no meaningful communication had been possible. They should have sought assistance from the applicant's mother (who could have at least informed them of the magnitude of his communication problems) rather than simply making the applicant sign the interrogation record. There had been a violation of Article 5(2).

**POLICE STATION CONDITIONS**

The physical environment of the police station, the availability of medical assistance and the health and social needs of detainees who are mentally ill or disabled are matters with which Articles 2 (Right to Life) and 3 (Inhuman or degrading treatment) of the ECHR are concerned.

**ECHR Article 2**

In ***Jasinskis v. Latvia (2010)***,[64] the applicant 'complained about the death in police custody of his deaf and mute son'. He sustained serious head injuries in a fall down some stairs, having been taken to the local police station and placed in a sobering-up cell for 14 hours as the police officers believed him to be drunk.

The ECtHR reiterated that Article 2 requires a state to take appropriate steps to safeguard the lives of those within its jurisdiction. In the case of a disabled person in detention, all the more care should be taken to ensure that the conditions correspond to their special needs. However, the police had not had the applicant medically examined, nor had they given him any opportunity to provide information about his state of health. Taking into account that he was deaf and mute, the police had a clear obligation, under domestic legislation and international standards, to at least provide him with a pen and paper to enable him to communicate his concerns. The police had failed in their duty to safeguard his life by providing him with adequate medical treatment. Furthermore, the investigation into the circumstances of his death had not been effective, in violation of Article 2 under its procedural limb.

**ECHR Article 3**

In ***Price v United Kingdom (2001)***,[65] the applicant was a four-limb deficient thalidomide victim who also suffered from kidney problems. She was committed to prison for contempt of court in the course of civil proceedings. She was kept one night in a police cell, where she had to sleep in her wheelchair, as the bed was not specially adapted for a disabled person, and where she was cold. She subsequently spent two days in a normal prison, where she was dependent on the assistance of male prison guards in order to use the toilet. The court held that there had been a violation of Article 3. It found that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3.

In ***Rupa v Romania (2008)***,[66] the applicant had suffered from psychological disorders since 1990 and was registered by the public authorities as having a second-degree disability. He alleged that twice he had been detained in inhuman and degrading physical conditions at police stations: firstly in January 1998 and later between March and June 1998.

64 Jasinskis v. Latvia, no. 45744/08, 21 December 2010.
65 Price v United Kingdom, no. 33394/96, 10 July 2001.
66 Rupa v Romania, no. 58478/00, 16 December 2008.

The court found that in January he spent the night following his arrest in the police holding room. This was furnished only with metal benches that were manifestly unsuitable for the detention of a person with the applicant's medical problems. He had also not had a medical examination on that occasion. The state of anxiety inevitably caused by such conditions had undoubtedly been exacerbated by the fact that he was guarded by the same police officers who took part in his arrest.

As regards his detention from 11 March to 4 June, his behavioural disorders had manifested themselves immediately after he was remanded in custody. These disorders could have endangered his own person. Therefore, the authorities were under an obligation to have him examined by a psychiatrist as soon as possible in order to determine whether his mental condition was compatible with detention, and what therapeutic measures should be taken. Further still, the Romanian government had not shown that the measures of restraint applied during his detention at the police station had been necessary. Subsequently, he was displayed before the court in public with his feet in chains. There had been a violation of Article 3.

In ***MS v the United Kingdom (2012)***,[67] the police were called out in the early hours because the applicant was highly agitated and sitting in a car sounding its horn continuously. He was detained by a police officer under the Mental Health Act 1983 and taken to a police station as a place of safety for a permitted period of up to 72 hours, to enable him to be assessed by a doctor and social worker. The police subsequently found his aunt at his address, seriously injured by him.

Unsuccessful efforts were made on the same day to place MS in a psychiatric medium secure unit. He remained in police custody for more than 72 hours, locked up in a cell where he kept shouting, taking off all of his clothes, banging his head on the wall, drinking from the toilet and smearing himself with food and faeces.

MS complained about being kept in police custody during a period of acute mental suffering when it had been clear to all that he was severely mentally ill and required hospital treatment as a matter of urgency. The court stated that there was no doubt that MS's initial detention had been justified and also authorised under English law. The court could not accept his criticism of the clinic's medical personnel or his allegation that his intake of liquid and food had been inadequate. However, the fact remained that he had been in a state of great vulnerability throughout his detention at the police station. As indicated by all the medical professionals who examined him, he had been in dire need of appropriate psychiatric treatment. That situation, which persisted until his transfer to the clinic on the fourth day of his detention, diminished excessively his fundamental human dignity. Throughout that time, he had been entirely under the control of the state and the authorities had been responsible for the treatment he experienced. The maximum 72-hour time limit for his detention had not been respected. Even though there had been no intention to humiliate MS, the conditions he had been required to endure had reached the threshold of degrading treatment.

**QUESTIONING IN A POLICE STATION**

The case of ***Blokhin v Russia (2016)***[68] concerned a 12-year old boy who was suffering from a mental and neuro-behavioural disorder. The applicant maintained in particular that the proceedings against him had been unfair, both because he had allegedly been questioned by the police in the absence of his guardian, legal counsel or a teacher and because he had not been given the opportunity to cross-examine the two witnesses against him.

67 MS v United Kingdom, no. 24527/08, 3 May 2012, [2012] ECHR 804.

68 Blokhin v Russia [GC], no. 47152/06, 23 March 2016.

The Grand Chamber held that there had been a violation of Article 6(1) and 6(3) (right to a fair trial) of the European Convention. The applicant's defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention.

The Grand Chamber underlined in particular that it was essential for adequate procedural safeguards to be in place to protect the best interest and well-being of a child when his or her liberty was at stake. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected. There had also been a violation of Article 3 and a violation of Article 5§1 (right to liberty and security) of the Convention.

**CHARGE**

Article 5(2) provides that everyone must be informed promptly, in a language which they understand, of the reasons for his arrest and of any charge against them.

Article 6(3) then provides that anyone arrested or charged on reasonable suspicion of having committed an offence 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, i.e. conditional bail is lawful where appropriate.

Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him.[69]

**Persons suffering mental ill-health**

In the case of a person with 'mental difficulties', the authorities are required to take additional steps to enable the person to be informed in detail of the nature and cause of the accusation against him: ***Vaudelle v France (2001)***.[70]

In that case, a guardianship judge had granted the applicant's son a special power of attorney to deal with the applicant's affairs, pending a decision about the need to make a guardianship order (tutelle) or supervision order (curatelle). Three months later, a complaint was lodged against the applicant for several alleged offences of indecent assault on minors. On 29 March 1995, the guardianship judge made a supervision order (curatelle), appointing the applicant's son as his supervisor. On the following day, the public prosecutor's office made an order for the applicant's examination by a psychiatrist in connection with the criminal proceedings. The applicant was given two appointments by the psychiatrist – on 20 April and 11 May 1995 – but did not attend either. On 19 October 1995, the Tours Criminal Court found the applicant guilty of sexual assault and sentenced him to a term of imprisonment.

It later transpired that the applicant's son, in his capacity as supervisor, was not informed of his arrest or conviction on 19 October 1995 until 16 April 1996, as all of the summonses and notices of appointment in the criminal proceedings were sent to his father directly. The applicant complained that he had been unable to exercise his defence rights properly in the criminal proceedings that had been instituted against him.

69 Pélissier and Sassi v. France [GC], no. 56891/00, 21 December 2006, §51; Kamasinski v. Austria, no. 9783/82, 19 December 1989, §79.

70 Vaudelle v France no. 35683/97, 30 January 2001.

The ECtHR noted that the proceedings before the criminal court were begun by direct summons without a prior investigative stage. The criminal court had convicted the applicant in a verdict delivered in adversarial proceedings even though the applicant was absent and unrepresented at the hearing, and it had not received the expert psychiatric report which the public prosecutor's office had itself previously ordered. Because the applicant was legally regarded as being incapable of acting on his own behalf in civil matters, he should also have been regarded as being equally incapable of acting alone in criminal proceedings. The court could not see on what basis or for what reason an individual who it was accepted was incapable of defending his civil interests, and was entitled to assistance for that purpose, should not also be given assistance to defend himself against a criminal charge:

*'59. In the Court's opinion … the Criminal Court was bound out of fairness to take additional steps before trying the case to ensure that the applicant effectively enjoyed the rights guaranteed to him by Article 6 … In that connection, it reiterates that it is important for the accused to be present in person at first instance … and points out that under Article 6§3(c) … the accused is entitled to have a lawyer assigned by the court of its own motion "when the interests of justice so require".*

*60. In addition: "Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves" (see, mutatis mutandis, Megyeri v. Germany, judgment of 12 May 1992, Series A no. 237-A, pp. 11-12, § 22; Winterwerp v. the Netherlands, judgment of 24 October 1979, Series A no. 33, p. 24, § 60 in fine; and Prinz, cited above, § 44).*

*61. In this context the supervision order, which was made seven months before the hearing in the Criminal Court and was still effective at the time, provides useful guidance. It shows that the national authorities had themselves decided at the material time that the applicant was not fully capable of acting alone on his own behalf. Like the applicant, the Court considers that, as he was regarded as being incapable of acting alone on his own behalf in the conduct of his civil affairs, he should have been regarded as being equally incapable of acting alone in the criminal proceedings. At stake in those proceedings was the right to liberty, a right whose importance in a democratic society has been consistently emphasised by the Court … [and] criminal proceedings produce far more serious consequences than civil proceedings.*

*62. The Court therefore fails to see on what basis or for what reason an individual who it is accepted is incapable of defending his civil interests and is entitled to assistance for that purpose should not also be given assistance to defend himself against a criminal charge ….*

*65. Ultimately, the Court considers that in a case such as the present one, which concerns a serious charge, the national authorities should take additional steps in the interests of the proper administration of justice. They could have ordered the applicant to attend the appointment with the psychiatrist … and to appear at the hearing and, in the event of his failing to comply, arranged for him to be represented by his supervisor or a lawyer. That would have enabled the applicant to understand the proceedings and to be informed in detail of the nature and cause of the accusation against him within the meaning of Article 6§ 3(a) of the Convention; it would also have enabled the Criminal Court to reach its decision entirely fairly. However, that did not happen.*

*66. In the special circumstances of this case, the Court therefore holds that there has been a violation of Article 6 of the Convention.'*

**ACCESS TO A LAWYER**

The right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial.[71] In order for the right to a fair trial to remain sufficiently 'practical and effective', Article 6(1) requires 'that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 … The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'[72]

See also ***Vaudelle v France (2001)***,[73] *supra*.

**SEIZURE AND RETENTION OF RECORDS AND PERSONAL INFORMATION**

The seizure of records and personal information raises issues concerning fairness and the use of legally or illegally obtained evidence at trial, i.e. Article 6 rights, but also Article 8 issues to do with privacy and confidentiality.

The Court has established that Article 8 can be engaged where an individual's name is included in a national sex-offenders database.[74]

**FINGERPRINTING**

The Court has established that Article 8 can be engaged by the absence of safeguards for the collection, preservation and deletion of fingerprint records of persons suspected but not convicted of criminal offences.[75]

**PERSONAL SEARCHES**

Strip-searches may constitute inhuman or degrading treatment and so violate Article 3 if conducted unnecessarily or in a way that violates human dignity. Non-intimate searches may violate Article 8 which protects a citizen's private life, home and correspondence.

**Strip-searches**

There have been a number of cases on strip-searches where a violation of Article 3 has been established.

71 Salduz v Turkey [GC], no. 36391/02, 27 November 2008, §51; Ibrahim and Others v United Kingdom [GC], nos. 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016, §255; Simeonovi v Bulgaria [GC], no. 21980/04, 12 May 2017, §112; Beuze v Belgium [GC], no. 71409/10, 9 November 2018, §123.

72 Salduz v. Turkey, supra, §55.

73 Vaudelle v France no. 35683/97, 30 January 2001.

74 Gardel v France, no 16428/05, 17 December 2009, §58.

75 MK v France, no. 19522/09, 18 April 2013, §26.

In ***Valašinas v. Lithuania (2001)***,[76] the applicant was ordered, following the visit of a relative, to strip naked in the presence of a woman prison officer, which he claimed had been done to humiliate him. He was then ordered to squat, and his sexual organs and the food he had received from the visitor were examined by guards who wore no gloves. The court found that the way in which this particular search had been conducted showed a clear lack of respect for the applicant, and in effect diminished his human dignity. It concluded that it had constituted degrading treatment in breach of Article 3.

See also:

- ***Iwańczuk v. Poland (2001)***[77] (a remand prisoner asked for permission to vote in parliamentary elections; he was told by prison guards that in order to be allowed to vote he would have to undress and undergo a body search; ridiculed and subjected to humiliating remarks; violation of Article 3; there had been no compelling reasons to find that the order to strip naked was necessary and justified for security reasons; lack of respect for his human dignity);
- ***Frérot v. France (2007)***[78] (prisoner subjected to unnecessary anal inspections; violation of Article 3);
- ***El Shennawy v. France (2011)***[79] (searches not based on pressing security needs; liable to arouse in the applicant feelings of arbitrariness, inferiority and anxiety characteristic of a degree of humiliation going beyond the level which the strip-searching of prisoners inevitably entails; violation);
- ***SJ (no 2) v Luxembourg (2012)***[80] (no violation; the layout of the search booth did not ensure complete privacy but no evidence that the prison guards were disrespectful or intended to humiliate the applicant);
- ***Milka v Poland (2015)***[81] (inadmissible; no element of debasement or humiliation which might give rise to a violation of Article 3).

**SEARCHES OF HOMES AND SURVEILLANCE**

Searching a suspect's or defendant's property or keeping them under surveillance may raise Article 3 and Article 8 issues.

In ***Van der Graaf v. the Netherlands (2004)***,[82] the applicant was arrested and taken into custody on suspicion of having shot and killed a well-known politician. He was placed under permanent camera surveillance at the remand centre where he was held. His complaints of a violation of Articles 3 and 8 were held to be inadmissible. It had not been sufficiently established that such a measure had in fact subjected him to mental suffering of a level of severity such as to constitute inhuman or degrading treatment. With regard to Article 8, the measure had a basis in domestic law and pursued the legitimate aim of preventing the applicant's escape or harm to his health. Therefore, given the great public unrest caused by the applicant's offence and the importance of bringing him to trial, the interference could be regarded as necessary in a democratic society in the interests of public safety and the prevention of disorder and crime.

76 Valašinas v Lithuania, no. 44558/98, 24 July 2001.
77 Iwańczuk v Poland, no. 25196/94 15 November 2001, (2001) 38 EHRR 148.
78 Frérot v France, no. 70204/01, 12 June 2007.
79 El Shennawy v France, no. 51246/08, 20 January 2011.
80 SJ (no 2) v Luxembourg, no. 47229/12, 31 October 2013.
81 Milka v Poland, no. 14322/12, 15 September 2015.
82 Van der Graaf v the Netherlands, no. 8704/03, 1 June 2004 (dec.).

**TAKING SAMPLES**

The taking of a blood and saliva sample against a suspect's wishes is a compulsory medical procedure and, even if of minor importance, therefore constitutes an interference with his right to privacy.[83] However, the Convention does not *per se* prohibit recourse to such a procedure in order to obtain evidence of a suspect's involvement in the commission of a criminal offence.[84]

**FORCED ADMINISTRATION OF SUBSTANCES**

In ***Jalloh v Germany (2006)***,[85] the applicant was forcibly administered an emetic in order to cause him to regurgitate a small bag of drugs he had swallowed just before he was arrested. The ECtHR observed that the Convention did not, in principle, prohibit recourse to a forcible medical intervention that would assist in the investigation of an offence. However, any interference with a person's physical integrity carried out with the aim of obtaining evidence had to be the subject of rigorous scrutiny. In the applicant's case the forcible administration of emetics did not appear to have been indispensable (the evidence could have been obtained using less intrusive methods), and the manner in which it was executed was brutal. The treatment was inhuman and degrading, in breach of Article 3.

In ***Bogumil v. Portugal (2008)***,[86] the applicant had swallowed a small bag of cocaine, which was then surgically removed. In finding no breach of Article 3, the court observed that the operation had been required by medical necessity as the applicant risked dying from intoxication and it had not been carried out for the purpose of collecting evidence. Indeed, the applicant had been convicted on the basis of other pieces of evidence.

## §–4 THE COURT PROCEEDINGS

**GENERAL PRINCIPLE**

The key principle governing the application of Article 6 is fairness.[87] The requirements of a fair hearing are stricter in the sphere of criminal law than under the civil limb of Article 6.[88]

What constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case.[89]

83 Jalloh v Germany [GC], no. 54810/00, 11 July 2006, §70; Schmidt v. Germany (dec.).

84 Jalloh v Germany [GC], no. 54810/00, 11 July 2006, §70. See also Caruana v Malta (dec.), no. 41079/16, May 2018, where the court considered that the taking of a buccal swab, was not a priori prohibited in order to obtain evidence related to the commission of a crime when the subject of the test was not the offender but a relevant witness (§32).

85 Jalloh v Germany [GC], no. 54810/00, 11 July 2006.

86 Bogumil v Portugal, no. 35228/03, 7 October 2008.

87 Gregačević v Croatia, no. 58331/09, 10 July 2012, §49.

88 Moreira Ferreira v Portugal (no. 2) [GC], no. 19867/12, 11 July 2017, §67; Carmel Saliba v. Malta, no. 24221/13, 29 November 2016, §67.

89 Ibrahim and Others v United Kingdom [GC], nos. 50541/08, 50571/08, 50573/08, and 40351/09, 13 September 2016, §250.

Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole, and not on the basis of an isolated consideration of one particular aspect or one particular incident. However, it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings.[90] Moreover, the cumulative effect of various procedural defects may lead to a violation of Article 6 even if each defect, taken alone, would not have convinced the court that the proceedings were unfair.[91]

Equality of arms is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present their case under conditions that do not place them at a disadvantage *vis-à-vis* their opponent.

**WAIVING ONE'S ARTICLE 6 RIGHTS**

Any waiver of the right to examine a witness must similarly be strictly compliant with the standards on waiver under case law.[92] Some Article 6 guarantees, such as the right to counsel, are so fundamental as to be subject to the 'knowing and intelligent waiver' standard established by case law, and this protection is especially important for people with impaired capacity and those whose physical disabilities may undermine their determination to insist on their rights:[93]

> *'77. In this respect the Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see Kwiatkowska v. Italy (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...; Kolu v. Turkey, no. 35811/97, § 53, 2 August 2005, and Colozza v. Italy, 12 February 1985, § 28, Series A no. 89). A waiver of the right, once invoked, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. Before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç v. Turkey, no. 32432/96, 27 March 2007, § 59, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003).*
>
> *78. The Court considers that the right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. It is not to be ruled out that, after initially being advised of his rights, an accused may himself validly waive his rights and respond to interrogation. However, the Court strongly indicates that additional safeguards are necessary when the accused asks for counsel because if an accused has no lawyer, he has less chance of being informed of his rights and, as a consequence, there is less chance that they will be respected.[94]*

90 Ibid, §250.

91 Mirilashvili v Russia, no. 6293/04, 11 December 2008, §165.

92 Murtazaliyeva v Russia [GC], no. 36658/05, 18 December 2018, §118.

93 Dvorski v Croatia [GC], no. 25703/11, 20 October 2015, §101; Pishchalnikov v Russia, no. 7025/04, 24 September 2009, §§77-79.

94 Pishchalnikov v Russia, supra, §§77-78.

**RIGHT OF 'EFFECTIVE PARTICIPATION'**

Article 6 entitles every person to 'a fair and public hearing by an independent and impartial tribunal'. If a person lacks the mental capacity to understand what is going on and to participate, this raises an issue of whether the trial is fair.[95] It is a misuse of the law, and does not reflect well on a civilised legal system, if a person who does not understand the trial is nevertheless forced to endure it. Furthermore, this poses a threat of convicting an innocent person.

A criminal defendant must be able to participate effectively in a court hearing, which must be organised to take account of their physical and mental state, age and other personal characteristics. Assistance by a lawyer may counter-balance a defendant's personal inability to participate effectively: ***Stanford v UK (1994)***.[96]

It was in the case of ***Stanford v UK (1994)*** that the European Court of Human Rights expressed the principle of effective participation for the first time. Bryan Stanford had been committed for trial by jury at Norwich Crown Court on seven counts arising out of his relationship with a young girl: indecent assault, two counts of rape, unlawful sexual intercourse, kidnapping and two counts of making a threat to kill. During the trial, Stanford was seated in a glass-fronted dock. He complained under Article 6(1) that he did not receive a fair trial because he was unable to hear the proceedings, including the witness statements made by the alleged victim, which resulted in his conviction. The ECtHR found no violation of Article 6, because apart from a minimal loss of sound due to the glass screen, the acoustic levels in the courtroom were satisfactory. Furthermore, counsel for Stanford, who could hear everything that was said and was able to take his client's instructions at all times, chose for tactical reasons not to bring the accused's hearing difficulties to the attention of the trial judge at any stage during the six-day hearing. The court stated in the judgment that the right of effective participation includes, amongst other things, the right to be present and the right to hear and follow the proceedings.

A defendant must feel sufficiently uninhibited by the atmosphere of the courtroom, especially when the case is surrounded by excessive public scrutiny, in order to be able to consult with his lawyers properly and participate effectively: ***T and V v. the United Kingdom (1999)***. [97]

In criminal cases involving minors, specialist tribunals must be set up to give full consideration to and make proper allowance for the 'handicaps' under which those defendants labour, and adapt their procedure accordingly: ***SC v United Kingdom (2004)*** .[98]

In ***SC v United Kingdom (2004)***, an eleven-year-old boy had attempted to rob an 87-year-old woman together with another boy. This led to the woman falling, thereby fracturing her arm. The boy was tried in an adult court and sentenced to detention for two-and-a-half years. The applicant alleged that, because of his youth and low intellectual ability, he was unable to participate effectively contrary to Article 6(1). The Court provided, for the first time, a definition of effective participation:

> *'Effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the*

95 See the following excellent article: Liselotte van den Anker, Lydia Dalhuisen, Marije Stokkel, Fitness to Stand Trial: A General Principle of European Criminal Law?, Utrecht Law Review, upon which this section of the paper draws.

96 Stanford v United Kingdom, no. 16757/90, 23 February 1994.

97 T and V v. United Kingdom 8 April 1999, (1999) 30 EHRR 12.

98 SC v United Kingdom, no. 60958/00, 15 June 2004, [2004] ECHR 263, §§27-37,

*general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.'*

Taking the Stanford case also into account, the right of effective participation includes:

- the right to be present;
- the right to hear and follow the proceedings;
- the right of an accused to be assisted by, for example, an interpreter, lawyer, social worker or friend;
- that the accused is able to follow what is said in court; and
- that the accused is able to explain his own version of the events and challenge the arguments and statements of the opposing party.

Provided the defendant has sufficient capacity, s/he is required to bring the question of their 'physical or other deficiency' to the attention of the court in order to enable the court to choose the best means of ensuring effective participation. When informed about a serious physical or mental impairment the trial court must ask for a medical expert opinion to rule on the applicant's readiness to participate effectively.[99]

A defendant may participate in a hearing by video-conference, but it should be justified by compelling reasons (for example, security considerations). The system should also function properly and ensure confidentiality of communication between defendants and lawyers.[100]

**Other cases**

In ***Liebreich v Germany (2008)***,[101] the applicant had been tried on charges of insurance fraud. He complained that he had been unable to participate effectively because of the effects of antidepressant medication. The ECtHR declared his complaint inadmissible as he had been represented by a lawyer with whom he could consult. Furthermore, the domestic German court had received information from a doctor who was treating the accused stating that he was fit to plead. The ECtHR also observed that there was nothing to indicate that the applicant, due to his depression and the effects of his medication, was unable to have a broad understanding of the trial process or unable to understand what was at stake for him. Therefore it could be concluded that the applicant was fit to plead. The court confirmed that good professional legal assistance can compensate for ineffective participation. It explicitly stated how it should be determined that there are reasons for concluding that a defendant is unfit to plead, namely by consulting a doctor.

See also ***Vaudelle v France (2001)***[102] above, in which the court could not see on what basis or for what reason an individual who was incapable of defending his civil interests and was entitled to assistance for that purpose should not also be given assistance to defend himself against a criminal charge.

99 Timergaliyev v Russia, no. 40631/02, 14 October 2008.

100 Marcello Viola v Italy, no. 45106/04, 5 October 2006 §§63-77; Golubev v. Russia, no. 26260/02 , 9 November 2006, (dec.)

101 Liebreich v Germany, no. 30443/03, 8 January 2008, (dec).

102 Vaudelle v France no. 35683/97, 30 January 2001.

**RIGHT TO CROSS-EXAMINE WITNESSES**

Only in exceptional circumstances, such as in cases involving sexual offences like the rape of a woman, or sexual abuse of a child, can the refusal of a key witness − the alleged victim — to testify serve as a legitimate ground for using testimony recorded pre-trial without summoning that witness. The aim here is consideration for the witness' mental state and the avoidance of undesired publicity at trial.[103]

**RIGHT TO INTERPRETER, e.g. SIGNER**

Article 6(3) requires the translation of some material but not all of the relevant documentation. It covers the translation or interpretation only of documents or statements − such as the charge, bill of indictment, key witness testimony, etc. — that are necessary for the defendant to have the benefit of a fair trial.[104] Because this is so, it is crucial that free translation or interpretation is adequately supplemented by legal assistance of sufficient quality.[105] The use of the word 'free' means that the authorities cannot recover costs of the interpretation at the end of the proceedings, regardless of their outcome.[106]

It can reasonably be argued that an inability to understand or speak arising from a physical disability, or a young or very old age, also invokes Article 6(3). However, following the decision in ***T and V v. the United Kingdom (1999)***[107] this issue may be looked at more appropriately from the point of view of general fairness under Article 6(1) and the principle of effective participation.

**EXPERT REPORTS**

Circumstances may require that courts accede to an accused's request for an expert opinion on a particular matter.

In ***GB v France (2002)***,[108] it appeared that an expert witness had a brief opportunity to study new documents in the middle of his oral evidence at the applicant's criminal trial. When the hearing resumed, the expert expressed a totally damning opinion that was entirely at odds with the written report he had prepared three and a half years earlier. The expert is alleged to have stated that, 'G.B. is a paedophile, for whom psychotherapy is necessary but would be ineffective because G.B. would have no feelings of guilt. The length of a prison sentence has no effect on an individual of this type and there is a high risk that he will reoffend.'

Having regard to the circumstances, namely the expert's *volte-face*, combined with the rejection of the application for a second opinion, the ECtHR considered that the requirements of a fair trial were infringed and the rights of the defence were not respected. Accordingly, there had been a breach of Article 6(1) and 3(b) of the Convention taken together.

103 Scheper v. the Netherlands, no. 39209/02, 5 April 2005, (dec.); SN v Sweden, no. 34209/96, 16 January 2001, (dec.).
104 Kamasinski v Austria, no. 9783/82, 19 December 1989.
105 Quaranta v Switzerland, no. 12744/87, 24 May 1991; Czekalla v Portugal, no. 38830/97, 10 October 2002.
106 Işyar v Bulgaria, no. 391/03, 20 November 2008, §§46-49.
107 T and V v. United Kingdom 8 April 1999, (1999) 30 EHRR 12.
108 GB v France (2002) 35 EHRR 36 no. 44069/98.

Note that the detention of a minor accused of a crime during the preparation of a psychiatric report necessary for the taking of a decision on his mental condition has been considered to fall under Article 5(1)(d), as being detention for the purpose of bringing a minor before the competent authority.[109]

**LEGAL AID**

Article 6 provides that everyone charged with a criminal offence has a right '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'.

In general terms, the right to legal aid is subject to two conditions which are to be considered cumulatively:[110]

- Firstly, the accused must show that s/he lacks sufficient means to pay for legal assistance.[111] However, s/he need not do so 'beyond all doubt'. It is sufficient that there are 'some indications' that this is so or, in other words, that a 'lack of clear indications to the contrary' can be established.[112] In any event, the court cannot substitute itself for the domestic courts in order to evaluate the applicant's financial situation at the material time but instead must review whether those courts, when exercising their power of appreciation in assessing the evidence, acted in accordance with Article 6(1).[113]

- Secondly, states are under an obligation to provide legal aid only 'where the interests of justice so require'.[114] This is to be judged by taking account of the facts of the case as a whole, including not only the situation obtaining at the time the decision on the application for legal aid is handed down but also that obtaining at the time the national court decides on the merits of the case.[115]

When determining whether the 'interests of justice' require an accused to be provided with free legal representation, the court has regard to various criteria, including the seriousness of the offence and the severity of the penalty at stake. In principle, where deprivation of liberty is at stake, the interests of justice call for legal representation.[116]

A further condition of the 'required by the interests of justice' test is the complexity of the case[117] as well as the personal situation of the accused.[118] The latter requirement is looked at especially with regard to the capacity of the particular accused to present their case were s/he not granted legal assistance.[119]

109 X v Switzerland, no. 8407/78, 6 May 1980.
110 Quaranta v Switzerland, no. 12744/87, 24 May 1991, §27)
111 Caresana v United Kingdom, no. 31541/96, 29 August 2000, (dec.).
112 Pakelli v Germany, no. 8398/78, 25 April 1983, §34; Tsonyo Tsonev v Bulgaria (no. 2), no. 2376/03, 14 January 2010, §39.
113 RD v Poland, nos. 29692/96 and 34612/97, 18 December 2001, §45.
114 Quaranta v Switzerland, no. 12744/87, 24 May 1991, §27.
115 Granger v United Kingdom, no. 11932/86, 28 March 1990 §46.
116 Benham v United Kingdom [GC], no. 19380/92, 24 May 1996, §61; Quaranta v Switzerland, no. 12744/87, 24 May 1991, §33; Zdravko Stanev v Bulgaria, no. 32238/04, 6 November 2012, §38.
117 Quaranta v Switzerland, no. 12744/87, 24 May 1991, §34; Pham Hoang v France, no. 13191/87, 25 September 1992, §40; Twalib v Greece, no. 42/1997/826/1032, 9 June 1998, §53.
118 Zdravko Stanev v Bulgaria, no. 32238/04, 6 November 2012, §38.
119 Quaranta v. Switzerland, no. 12744/87, 24 May 1991, §35; Twalib v Greece, no. 42/1997/826/1032, 9 June 1998, §53.

The right to legal aid is also relevant for the appeal proceedings.[120] In this context, in determining whether legal aid is needed, the court takes into account three factors in particular: (a) the breadth of the appellate court's power; (b) the seriousness of the charges against applicants; and (c) the severity of the sentence they face.[121]

Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to be defended by counsel 'of one's own choosing' is necessarily subject to certain limitations where free legal aid is concerned. Article 6(3)(c) cannot be interpreted as securing a right to have public defence counsel replaced.[122]

**Cases involving persons suffering mental ill-health**

In the ***Megyeri Case (1992)***,[123] the applicant's confinement was grounded on a finding in criminal proceedings that he was not responsible for his acts because he was suffering from a schizophrenic psychosis with signs of paranoia. Sometime later, in July 1986, the Aachen Regional Court had before it expert evidence stating that his condition had deteriorated, he was unwilling to undergo treatment and he had shown a distinct propensity towards aggressive behaviour and violence. Before the Commission, Mr Megyeri submitted that the failure to appoint a lawyer to assist him in the 1986 regional court proceedings concerning his possible release violated Article 5(4). The court found it was doubtful 'to say the least' whether, acting on his own, he was able to marshal and present adequately points in his favour on the relevant issues, involving as they did matters of medical knowledge and expertise. It was even more doubtful whether, on his own, he was in a position to address adequately the legal issue arising: would his continued confinement be proportionate to the aim pursued (the protection of the public). There had been a breach of Article 5(4).

The court stated that the principles enshrined within Article 5(4) included the following:

1. A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings 'at reasonable intervals' before a court to put in issue the 'lawfulness' of their detention (see, *inter alia*, *X v United Kingdom*, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52).
2. It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Winterwerp v Netherlands*, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR 387, §60).
3. Article 5(4) does not require that persons committed to care under the head of 'unsound mind' should themselves take the initiative in obtaining legal representation before having recourse to a court (see *Winterwerp v Netherlands*, supra, §66).
4. It followed that where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences, but in respect of which he could not be held responsible on account of mental illness, he should (unless there were special circumstances) receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what was at

120 Volkov and Adamskiy v Russia, nos. 7614/09 and 30863/10, 26 March 2015, §§56-61.
121 Mikhaylova v Russia, no. 46998/08, 19 November 2015, §80.
122 Lagerblom v Sweden, no. 26891/95, 14 January 2003, §55.
123 Megyeri v Germany, no. 13770/88, 12 May 1992, (1993) 15 EHRR 584, [1992] ECHR 49.

stake for him (personal liberty) taken together with the very nature of his affliction (diminished mental capacity) compelled this conclusion.

In ***Aerts v Belgium (1998)***,[124] the court found that the refusal of the Legal Aid Board to fund a lawyer for Mr Aerts' further appeal breached article 6(1) because it impaired the very essence of the right to a fair hearing. It was not appropriate for the Legal Aid Board to assess the merits of his claim, and refusing to fund counsel denied him the opportunity to have his civil rights determined before a tribunal:

> *'That being so, the applicant, who did not have sufficient means to pay a lawyer, could legitimately apply to the Legal Aid Board with a view to an appeal on points of law, since in civil cases Belgian law requires representation by counsel before the Court of Cassation. It was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal. There has accordingly been a breach of Article 6 § 1.'*[125]

**DETENTION ON MENTAL HEALTH GROUNDS AND ARTICLE 5(1)(e)**

The essential objective of Article 5 is to prevent citizens from being deprived of their liberty arbitrarily.[126] No detention that is arbitrary can ever be regarded as 'lawful'.

Arbitrariness may arise where there is no proportionality between the ground of detention relied on and the detention in question.[127] In terms of the principle of proportionality, the authorities should consider less intrusive measures than detention.[128]

**Place and conditions of detention**

As regards the relationship between the ground relied upon and the place and conditions of detention, in principle the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons.[129] However, where the circumstances justify it, a person may be placed temporarily in an establishment not specifically designed for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long.[130]

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124 Aerts v Belgium, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.

125 Aerts, supra, para. 60.

126 See e.g. Witold Litwa v Poland, no. 26629/95, 4 April 2000, ECHR 2000-III, §78.

127 See James, Wells and Lee v the United Kingdom, nos. 25119/09, 57715/09 and 57877/09, 18 September 2012, §§191-95; Saadi v the United Kingdom [GC], no. 13229/03, 29 January 2008, §§68-74.

128 Ambruszkiewicz v Poland, no. 38797/03, 4 May 2006, §32.

129 LB v Belgium, no. 22831/08, 2 October 2012, §93; Ashingdane v United Kingdom, no. 8225/78, 28 May 1985, Series A no. 93, (1985) 7 EHRR 528, [1985] ECHR 8, §44; OH v Germany, no. 4646/08, 24 November 2011, §79.

130 Pankiewicz v Poland, no. 34151/04, 12 February 2008, §§44-45; Morsink v Netherlands, no. 48865/99, 11 May 2004, §§67-69; Brand v Netherlands, no. 49902/99, 11 May 2004, §§64-66. With regard to Article 5§1(e), the case law provides that it should not be interpreted as only allowing the detention of 'alcoholics' in the limited sense of persons in a clinical state of 'alcoholism', because nothing in the text of this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking:

In ***Aerts v Belgium (1998)***,[131] national legislation provided only for the detention of a mentally ill person in a prison as a provisional measure, pending a designation by the mental health board as to the institution where the person was to be detained. The applicant maintained that his detention for seven months in the psychiatric wing of Lantin Prison, pending transfer to the Paifve Social Protection Centre (his designated place of detention), breached Article 5. The prison psychiatric wing was not an appropriate institution for the treatment of the mentally ill and the treatment he received there had done him harm. The court reiterated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic or other appropriate institution. Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind. Indeed, on 2 August 1993, the Mental Health Board had expressed the view that the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. The proper relationship between the aim of the detention and the location and conditions in which it took place was therefore deficient, and there had been a breach of Article 5.

**The need for a medical opinion**

Except in an emergency, no deprivation of liberty on the ground of unsoundness of mind will be compatible with Article 5(1)(e) if it has been ordered without seeking a medical expert opinion.[132] The individual must be reliably shown to be of 'unsound mind', that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise.

A mental condition must be of a certain gravity in order to be considered as a 'true' mental disorder.[133] The relevant time at which a person must be reliably established to be of unsound mind is the date of adoption of the measure depriving that person of their liberty as a result of that condition.[134]

**Refusal to co-operate with a psychiatric assessment**

Where the lack of co-operation by the individual prevents a diagnostic report being issued, it is acceptable for the court ruling or the detention on mental health grounds to rely on other medical reports, opinion: and examinations showing clearly that he is nonetheless mentally disturbed.[135]

**Orders of public prosecutors**

In ***Varbanov v Bulgaria (2000)***,[136] the applicant refused an invitation by the prosecutor to undergo psychiatric examination, as a result of which he was forcefully detained at a psychiatric hospital. This was done without consulting a medical expert and no emergency was claimed. By not requiring a medical opinion prior to detention, domestic law failed to protect against arbitrariness:

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Kharin v Russia, no. 37345/03, 3 February 2011, §34. Therefore, persons whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves can be taken into custody for the protection of the public or their own interests, such as their health or personal safety: Hilda Hafsteinsdóttir v Iceland, no. 40905/98, 8 June 2004, Witold Litwa v Poland, no. 26629/95, 4 April 2000, ECHR 2000-III, §42. However, this does not mean however that Article 5§1(e) permits the detention of an individual merely because of his alcohol intake: Witold Litwa v Poland, supra, §§ 61-62.

131 Aerts v Belgium, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.

132 Ruiz Rivera v Switzerland, no. 8300/06, 18 February 2014, §59; SR v Netherlands (dec), no. 13837/07, 18 September 2012, §31.

133 Glien v Germany, no. 7345/12, 28 November 2013, §85.

134 OH v Germany, no. 4646/08, 24 November 2011, §78.

135 Constancia v Netherlands, no.73560/12, 3 March 2015, (dec.).

136 Varbanov v Bulgaria (2000), 5 October 2000, ECHR 2000-X at §§4-48.

*'47. The Court considers that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1(e) if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention.*

*The particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases a prior consultation should be necessary. Where no other possibility exists, for instance due to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be required, failing which it cannot be maintained that a person has reliably been shown to be of unsound mind.*

*Furthermore, the medical assessment must be based on the actual state of mental health of the person concerned and not solely on past events. A medical opinion cannot be seen as sufficient to justify deprivation of liberty if a significant period of time has elapsed.'*

See also ***CB v Romania (2010)***,[137] where the applicant was taken forcibly into custody following vexatious complaints lodged by him against a police officer. He was handcuffed and transferred to a psychiatric hospital for 14 days on order of a public prosecutor without any medical examination by an appropriately qualified doctor.

**Standard of proof required for detention for assessment**

Proof of an established mental disorder is not required at the initial taking into detention for an initial period of assessment. It may be enough that there is some medical evidence, and genuine concerns that the person is a risk to themselves or others.[138] The medical opinion relied on should, however, reflect the applicant's condition at the time of the decision, a delay between the medical examination and the presentation of the opinion in court being capable of disclosing arbitrariness.[139]

**Whether in criminal proceedings the person must lack criminal capacity**

Lawful detention under Article 5(1)(e) in criminal matters does not require that the person also lacks criminal capacity. It is sufficient that the detainee, in this case one diagnosed with dissocial personality and paedophilia, is a risk to others: ***Glien v Germany (2013)***.[140]

**Whether the person's condition must be treatable**

The requirement that a person is suffering from mental disorder warranting compulsory confinement does not include or infer an additional requirement that the condition is amenable to medical treatment, the so-called 'treatability criteria' found in some domestic laws.[141] Confinement may be necessary not only where a person requires treatment or therapy, but also when the person needs

137 CB v Romania, no. 21207/03, 20 April 2010, §§48–59.

138 SR v Netherlands, no. 13837/07 (dec.), 28 September 2012.

139 Musial v Poland, 25 March 1999, ECHR 1999-11, 31 E.H.R.R. 720, §50, where the court decision ordering continued detention was based on an examination which took place some 11 months earlier; see also Varbanov v Bulgaria, no. 31365/96, ECHR 2000-X, §47; Magalhaes Pereira v Portugal, no. 44872/98, 26 February 2002. See also HW v Germany, no. 17167/11, 19 September 2013, where a 12-year old assessment of a prisoner's mental disorder and dangerousness meant that there was no sufficient lawful basis or justification for his continued detention.

140 Glien v Germany, no. 7345/12, 28 November 2013, §§84–91.

141 Koniarska v UK, no.33670/96) (dec.), 12 October 2000.

control and supervision to prevent harm to himself or others: ***Hutchison Reid v UK (2003)***.[142] In that case, the applicant's psychopathic disorder was not appropriate for hospital treatment. However, the ECtHR found that it was not contrary to Article 51(e) to detain him in hospital as it was not disputed that his mental disorder made him a risk to the public.

**Whether it must be proved that the person did the act that led to him being charged**

It is not necessary to establish whether the person has committed the acts which led to the proceedings against him, if it is duly established that s/he is of unsound mind requiring confinement.[143] It is also not arbitrary that this detention flows from proceedings concerned with a criminal defendant's fitness to plead.

**SENTENCING**

See also: Detention on Mental Health Grounds and Article 5(1)(e), above.

**Automatic life sentences and persons with mental ill-health**

In ***Drew v United Kingdom (2006)***,[144] it was held that a statutory requirement that courts pass an automatic life sentence for a second serious sexual or violent offence in the absence of exceptional circumstances, even in the case of 'a mentally-disordered offender', did not breach Article 3 or Article 5.

**Suspending execution of the sentence on medical grounds**

In ***Xiros v. Greece (2010)***[145] the Court found that a refusal to suspend the execution of the applicant's prison sentence in order to allow him to undergo specialist hospital treatment for his eyesight had amounted to a violation of Article 3.

In **Contrada (no 2) v. Italy (2014),**[146] an 82-year old applicant alleged that, in view of his age and his state of health, the authorities' repeated refusal of his requests for a stay of execution of his sentence, or for the sentence to be converted to house arrest, had amounted to inhuman and degrading treatment. The European Court held that there had been a violation of Article 3. It observed that it was beyond doubt that the applicant suffered from a number of serious and complex medical disorders, and all the medical reports and certificates submitted to the authorities had consistently and unequivocally found that his state of health was incompatible with the prison regime to which he was subjected. In the light of the medical certificates available to the authorities, the nine months that elapsed before he was placed under house arrest, and the reasons given for the decisions refusing his requests, his continued detention had violated Article 3.

142 Hutchison Reid v United Kingdom, no. 50272/99, 20 February 2003, ECHR 2003-IV, [2003] ECHR 94, (2003) 37 EHRR 211, § 51.

143 Juncal v UK, no.32357/09) (dec.), 17 September 2013.

144 Drew v United Kingdom, no. 35679/03, 7 March 2006, [2006] ECHR 1172.

145 Xiros v. Greece, no. 1033/07, 9 September 2010.

146 Contrada (no 2) v. Italy (2014), 7509/08, 11 February 2014.

# §–5 POST-SENTENCE

An individual may be detained post-sentence in a prison following the imposition of a term of imprisonment (see below, **§6 Prison Conditions**) or in a psychiatric facility pursuant to an order made by the criminal court committing him to hospital.

**DETENTION IN HOSPITAL UNDER A COURT ORDER**

Where a defendant is committed to a psychiatric unit by the criminal court, the validity of their continued confinement depends upon the persistence of a mental disorder justifying detention.

**Delay in discharging a patient**

When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant's confinement.[147] However, the continuation of a deprivation of liberty for purely administrative reasons is not justified.[148]

In the ***Luberti Case (1984)***,[149] the court accepted that terminating the confinement of an individual whom a court has previously found to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to that fact, and the very serious nature of the offence committed by the applicant when mentally ill, the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.

In ***Johnson v United Kingdom (1997)***,[150] the applicant's detention in Rampton [high secure] Hospital was reviewed by a tribunal on 15 June 1989. The tribunal accepted the medical evidence that he was not then suffering from mental illness, stating that the episode of mental illness from which he formerly suffered has come to an end. It ordered his conditional rather than absolute discharge, because he required rehabilitation under medical supervision in a hostel environment, and a recurrence of his mental illness requiring recall to hospital could not be excluded. This discharge was deferred until arrangements could be made for his suitable accommodation. Considerable efforts to secure a hostel were unsuccessful. Eventually, on 12 January 1993, a tribunal ordered his absolute discharge. The applicant complained that his detention between 15 June 1989 and 12 January 1993 violated Article 5(1). More particularly, the tribunal in 1989 should have ordered his immediate and unconditional discharge, since he had made a full recovery from the episode of mental illness specified in the hospital order imposed by the court.

The court observed that it does not automatically follow from a finding by an expert authority that the mental disorder which justified confinement no longer persists that therefore the patient must be immediately and unconditionally released into the community. Such a rigid approach would place an unacceptable degree of constraint on the responsible authority's exercise of judgment when determining whether the interests of the patient and the community will be best served by such a course of action. In the field of mental illness, the assessment as to whether the disappearance of symptoms is confirmation of complete recovery is not an exact science. Whether or not recovery from the episode of illness which justified the confinement is complete and definitive, or merely apparent, cannot always be measured with absolute certainty. It is the patient's behaviour outside the confines of the psychiatric institution which will be conclusive of this. Therefore, a responsible authority is

147 Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.
148 RL and M-JD v France, no. 44568/98, 19 May 2004, §129.
149 Luberti v Italy, no. 9019/80, 23 February 1984, Series A no. 75, [1984] ECHR 3, [1984] ECHR 3, §28.
150 Johnson v United Kingdom, no. 22520/93, 24 October 1997, (1997) 27 EHRR 296, [1997] ECHR 88.

entitled to exercise a measure of discretion in deciding whether it is appropriate to order immediate and absolute discharge in a case as this. It is, however, of paramount importance that appropriate safeguards are in place which ensure that any deferral of discharge is consonant with the purpose of Article 5(1)(e) and, in particular, that discharge is not unreasonably delayed.

Although the tribunal was entitled to conclude that it was premature to order Mr Johnson's absolute and immediate discharge from hospital, it lacked the power to guarantee that he would be relocated to a suitable hostel within a reasonable time. The onus was on the authorities to secure a hostel willing to admit him. In between reviews, Mr Johnson could not petition the tribunal to have the terms of the residence condition reconsidered; nor was the tribunal empowered to monitor the progress made in the search for a hostel outside the annual reviews, and to amend the deferred conditional discharge order in the light of the difficulties encountered by the authorities. The imposition of the hostel residence condition in 1989 by the tribunal therefore led to the indefinite deferral of the applicant' release from hospital. Having regard to this situation, and the lack of adequate safeguards, including provision for judicial review to ensure that his release would not be unreasonably delayed, his continued confinement after 15 June 1989 could not be justified under Article 5(1)(e).

**Recall to hospital of patients discharged on conditions**

Where a patient is released on conditions, there have been a number of cases which deal with what needs to be shown in order to lawfully recall the person to hospital for a further period of detention there.

In ***X v United Kingdom (1981)***,[151] a patient who was subject to special restrictions because of a risk of serious harm to others complained that it had been unlawful for the Home Secretary to recall him to Broadmoor (high-secure) Hospital without any doctor having certified first that he was of unsound mind. This argument was rejected by the court. The court noted that the Home Secretary's power of recall was concerned,

> *'with the recall, perhaps in circumstances when some danger is apprehended, of patients whose discharge from hospital has been restricted for the protection of the public ... The Winterwerp judgment expressly identified "emergency cases" as constituting an exception to the principle that the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind"; nor could it be inferred from the Winterwerp judgment that the "objective medical expertise" must in all conceivable cases be obtained before rather than after confinement of a person on the ground of unsoundness of mind. Clearly, where a provision of domestic law was designed ... to authorise the emergency confinement of persons capable of presenting a danger to others, it would be impracticable to require thorough medical examination prior to any arrest or detention. A wide discretion must in the nature of things be enjoyed by the national authority empowered to order such emergency confinements.'*

The court found that the statutory conditions governing a recall to hospital were not incompatible with the meaning under the Convention of the expression 'the lawful detention of persons of unsound mind'. In circumstances such as X's, the interests of the protection of the public prevailed over the individual's right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees. However, following the use for a short period of such an emergency measure, the patient's further detention in hospital had to satisfy the minimum conditions described in *Winterwerp.*

151 X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

As with ***X v United Kingdom (1981)***, the applicant in ***Kay v United Kingdom (1994)***[152] complained about his recall to Broadmoor Hospital without a prior medical assessment, in his case on the expiration of a lengthy prison sentence. The Commission noted that his recall was in accordance with the procedures prescribed by domestic law. Furthermore, the Home Secretary was entitled to be concerned about the protection of the public in the light of the applicant's history of psychopathy, and his serious criminal record involving extreme violence towards girls and women. However, this historical background did not mean that one could dispense with the need to obtain up-to-date medical evidence about the applicant's mental health before ordering his recall. The most recent tribunal decision in 1986 had found that there was no evidence the applicant was then suffering from a psychopathic disorder and the weight of medical evidence at the time of recall was in his favour. It had not been impossible to have him assessed in prison, and the existence of a dissenting report from a Broadmoor doctor who had not interviewed him could not outweigh the tribunal's finding, nor provide a sufficient scientific basis for his continued compulsory confinement in hospital nearly three years later. Consequently, when the Home Secretary decided to recall the applicant to Broadmoor certain minimum conditions of lawfulness were not respected. In particular, there was no up-to-date objective medical expertise showing that the applicant suffered from a true mental disorder, or that his previous psychopathic disorder persisted. In the absence of any emergency, there were no particular circumstances to justify the omission. Accordingly, the applicant's recall and return to Broadmoor could not be qualified as the lawful detention of a person of unsound mind for the purposes of Article 5(1)(e).

In ***Roux v United Kingdom (1996)***,[153] the applicant was subject to special restrictions because of a risk of serious harm to others. He complained that it had been unlawful for the Home Secretary to recall him to Broadmoor [high-secure] Hospital because of a concern that he was beginning to repeat the pattern of behaviour evident before the commission of his two offences against prostitutes. Mr Roux complained that his recall contravened Article 5 because he had not failed to comply with or breached any condition of the tribunal order discharging him and no breach of an obligation prescribed by law. Furthermore, no court had determined the state of his mental health at the time of his recall. The Government submitted that the Home Secretary's power of recall was not limited by the conditions attached to release and there could be occasions where recall was appropriate even though no conditions had been breached. Conversely, some breaches of the conditions of discharge from hospital would not warrant recall to hospital. In the event, a friendly settlement was reached, whereby the Government agreed to pay £2,000 to the applicant together with the agreed costs.

**RIGHT OF APPEAL AND ARTICLE 5(4)**

Article 5(4) provides that everyone who is deprived of their liberty by arrest or detention is entitled to take proceedings by which the lawfulness of their detention shall be decided speedily by a court and their release ordered if the detention is not lawful.'[154]

Article 5(4) is the *habeas corpus* provision of the Convention. It provides detained persons with the right to seek a judicial review of their detention[155] and this extends to both the procedural and substantive justifications of the deprivation of liberty.[156]

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152 Kay v United Kingdom, no. 17821/91, 1 March 1994, [1994] ECHR 51.

153 Roux v United Kingdom, no. 25601/94, 4 September 1996.

154 As concerns access to justice, see also Article 13 of the UNCRPD. The Convention on the Rights of Persons with Disabilities, United Nations, Treaty Series 2515 (2006).

155 Mooren v Germany [GC], no. 11364/03, 9 July 2009, §106; Rakevich v Russia, no. 58973/00, 28 October 2003, §43.

156 Idalov v Russia [GC], no. 5826/03, 22 May 2012, §161; Reinprecht v Austria, no. 67175/01, 12 April 2006, ECHR 2005-XII, (2007) 44 EHRR 39, IHRL 3254, §31.

Furthermore, the notion of 'lawfulness' in Article 5§4 has the same meaning as in Article 5§1. Consequently, the detained person is entitled to a review of the 'lawfulness' of their detention not just in terms of the requirements of domestic law but also the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5§1.[157]

The remedy of habeas corpus does not enable a judicial determination as wide as this because where the terms of a statute afford the executive a discretion, whether wide or narrow, the review exercisable by the courts in habeas corpus proceedings bears solely on the conformity of the exercise of that discretion with the empowering statute.[158]

The Article 5§1(e) criteria for 'lawful detention' necessitates that the review guaranteed by Article 5§4 in relation to the continuing detention of a mental health patient should be made by reference to their contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the time of the initial decision to detain.[159]

A person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings 'at reasonable intervals' to put in issue the lawfulness of their detention.[160] A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own.[161]

The forms of judicial review which satisfy the requirements of Article 5§4 may vary from one domain to another and will depend on the type of deprivation of liberty in issue.[162]

Where the European Court of Human Rights court has found no breach of the requirements of Article 5§1, this does not release the court from carrying out a review of compliance with Article 5§4. The two paragraphs are separate provisions. Observance of the former does not necessarily entail observance of the latter.[163]

It is not always necessary that an Article 5§4 procedure is attended by the same guarantees as are required under Article 6 for criminal or civil litigation but it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty.[164]

The 'court' to which the detained person has access does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country.[165] However, it must be a body of 'judicial character' offering certain procedural guarantees appropriate to the kind of deprivation of liberty in question.[166] To satisfy the requirements of the Convention the review must comply with both

157 Suso Musa v Malta, no. 42337/12, 23 July 2013, §50.

158 See X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188.

159 See X v United Kingdom, supra.

159 Juncal v United Kingdom (dec), no. 32357/09, 17 September 2013, §30; Ruiz Rivera v Switzerland, no. 8300/06, 18 February 2014, §60.

160 Ibid, §77.

161 X v Finland, no. 34806/04, 3 July 2012, §170; no. 24086/03, 17 December 2013, §82.

162 MH v United Kingdom, no. 11577/06, 22 October 2013, §75.

163 Douiyeb v Netherlands [GC], no. 31464/96, 4 August 1999, §57; Kolompar v Belgium, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §45.

164 A and Others v United Kingdom [GC], no. 3455/05, 19 February 2009, §203; Idalov v Russia [GC], no. 5826/03, 22 May 2012, §161.

165 Weeks v United Kingdom, no. 9787/82, 2 March 1987, Series A no. 114, (1988) 10 EHRR 293, §61.

166 See e.g. De Wilde, Ooms and Versyp v Belgium, nos. 2832/66; 2835/66; 2899/66, 18 June 1971, Series A no. 12, §§76 and 78.

the substantial and procedural rules of national legislation and be conducted in conformity with the aim of Article 5, which is to protect the individual against arbitrariness.[167] The 'court' must be independent both of the executive and of the parties to the case,[168] and have the power to order release if it finds that the detention is unlawful. A mere power of recommendation is insufficient.[169]

**A 'speedy' decision**

Article 5§4 also proclaims the right to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it is unlawful.[170]

The term 'speedily' cannot be defined in the abstract. As with the 'reasonable time' requirements of Article 5§3 and Article 6§1, whether the decision has been made 'speedily' must be determined in the light of the circumstances of the particular case.[171]

The notion of 'speedily' (*à bref délai*) indicates a lesser urgency than that of 'promptly' (*aussitôt*) in Article 5§3.[172] However, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of 'speediness' of judicial review under Article 5§4 comes closer to the standard of 'promptness' under Article 5§3.[173] The relevant starting point is the date when the application for release was made/the proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant's detention, including any appeal.[174]

Where the judicial determination involves complicated issues — such as the detained person's medical condition — this may be taken into account when considering how long is 'reasonable' under Article 5§4. However, even in complicated cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention.[175]

If the length of time before a decision is taken is *prima facie* incompatible with the notion of speediness, the court will look to the state to explain the reason for the delay.[176]

In assessing the speedy character required by Article 5§4, factors such as the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state's responsibility may be taken into consideration.[177]

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167 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §27.

168 Stephens v Malta (no. 1), no. 11956/07, 21 April 2009, §95.

169 Benjamin and Wilson v United Kingdom, no. 28212/95, 26 September 2002, §§33-34.

170 Ibid, §154; Baranowski v Poland, no. 28358/95, 28 March 2000 ECHR 2000-III, §68.

171 RMD v Switzerland, no. 19800/92, 26 September 1997, §42; Rehbock v Slovenia, no. 29462/95, 28 November 2000, ECHR 2000-XII, §84.

172 E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; Brogan and Others v United Kingdom, nos. 11234/84 and 11209/84, 29 November 1988, Series A no. 145-B, (1988) 11 EHRR 117, §59.

173 Shcherbina v Russia, no. 41970/11, 26 June 2014, §§65-70, where a delay of sixteen days in the judicial review of the applicant's detention order issued by the prosecutor was found to be excessive.

174 Sanchez-Reisse v Switzerland, no. 9862/82, 21 October 1986, Series A no. 107, [1986] ECHR 12, (1986) 9 EHRR 71, §54; E. v Norway, §64.

175 Frasik v Poland, no. 22933/02, 5 January 2010, §63; Jablonski v Poland, no. 33492/96, 21 December 2000, §§91-93.

176 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820, §29.

177 Mooren v Germany [GC], no. 11364/03, 9 July 2009, §106; Kolompar v Belgium, no. 11613/85, 24 September 1992, Series A no. 235-C, 16 EHRR 197, §42.

Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities.[178]

In the case of ***Barclay-Maguire v United Kingdom (1983)***,[179] the Commission declared admissible an application which alleged that a delay of 18 weeks between the making of a tribunal application and its determination contravened Article 5(4). The government, seeking a settlement from the Commission, suggested 13 weeks as a reasonable target time. It subsequently failed to meet this target. A number of patients subsequently sought judicial review in relation to delayed hearings but judgment was avoided by offering them an earlier date, necessarily at the expense of other patients.[180]

In ***Koendjbiharie v Netherlands (1990)***,[181] the relevant period was held to have began on 17 May 1984 when the application to extend the patient's confinement was filed with the Court of Appeal. The decision was received more than four months later. Such a lapse of time was not compatible with the notion of speediness. The court, accordingly, found a failure to comply with the requirement of 'speediness' laid down in Article 5(4).

In ***Kay v United Kingdom (1994)***,[182] the Commission referred to the court's case law that periods of eight weeks to five months in mental health determinations were difficult to reconcile with the notion of 'speedily' in Article 5(4) of the Convention.[183]

It was not contested by the government that mental health review tribunals frequently took up to six months to determine cases like the applicant's. In Kay's case, the determination took just over two years and the first hearing date proposed by the tribunal was nearly five months after referral. In the Commission's view, the system itself was inherently too slow. The tribunal proceedings were not conducted 'speedily' within the meaning of Article 5(4).

In ***Pauline Lines v United Kingdom (1997)***,[184] the applicant was subject to special restrictions because of a risk of serious harm to others. She was readmitted to hospital on 27 July 1993. On 7 December 1993, the Home Secretary referred her case to a tribunal which then heard the matter on 23 February 1994. The patient complained about the length of time it took for her to have a review following admission, contrary to Article 5(4). The Commission unanimously declared her complaint to be admissible. In the event, a friendly settlement was reached, whereby the government paid the applicant's representatives £3591.75, of which £2000 represented compensation and the remainder costs.

In ***RSC v United Kingdom (1997)***,[185] the applicant was subject to special restrictions because of a risk of serious harm to others. He was recalled to Broadmoor [high-secure] Hospital on 16 November 1994. On 22 November 1994, the Home Secretary referred his case to a tribunal, which adjourned the initial hearing on 20 September 1995 and did not determine his detention until 25 March 1996. The applicant alleged a violation of Article 5(4), *inter alia* on the ground that the tribunal did not decide

178 E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §66; Bezicheri v Italy, no. 11400/85, 25 October 1989, Series A no. 164, (1990) 12 EHRR 210, [1989] ECHR 19, §25.

179 Barclay-Maguire v United Kingdom (dec), no. 9117/80, 9 December 1983.

180 See e.g. the judicial review applications in R. v Mental Health Review Tribunal, ex p. Hudson (unreported, 1986) and R. v Mental Health Review Tribunal, ex p. Mitchell (unreported, 1985).

181 Koendjbiharie v Netherlands, no. 11487/85, 25 October 1990, Series A no. 185-B, [1990] ECHR 28, (1991) 13 EHRR 820.

182 Kay v United Kingdom, no. 17821/91, 1 March 1994, [1994] ECHR 51.

183 E v Norway, no. 11701/85, 29 August 1990, Series A no. 181-A, (1994) 17 EHRR 30, §64; Van der Leer v the Netherlands, supra, §§ 27-28; X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §§32–36.

184 Pauline Lines v United Kingdom, European Commission, no. 2451/94, 17 January 1997.

185 RSC v United Kingdom, European Commission, no. 27560/95, 28 May 1997.

the matter 'speedily'. A friendly settlement was reached. The government agreed to pay the applicant £2,000 compensation, together with £2,800 costs. It also undertook to amend the tribunal rules, so that when a conditionally discharged patient was recalled there must be a tribunal hearing within two months from the date on which the case was referred to the tribunal.

**Periodic reviews**

The detention of persons on the ground of unsoundness of mind constitutes a special category with its own specific problems. In particular, the reasons initially warranting confinement may cease to exist. The very nature of the deprivation of liberty 'would appear to require a review of lawfulness to be available at reasonable intervals. By virtue of Article 5(4), a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is thus in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the lawfulness ... of his detention, whether that detention was ordered by a civil or criminal court or by some other authority.'[186]

Whereas one year per instance may be a rough rule of thumb in Article 6§1 cases, Article 5§4 concerns issues of liberty which require particular expedition.[187] Where an individual's personal liberty is at stake, the court has very strict standards concerning the state's compliance with the requirement of speedy review of the lawfulness of detention.

The applicant in ***Turnbridge v United Kingdom (1990)***[188] was detained in Broadmoor [high-secure] Hospital. He complained that an annual review of the lawfulness of his detention by a tribunal was insufficient. The Commission found nothing to suggest that the period of a year which the applicant must respect before reapplying to a tribunal for his discharge was an unreasonable interval in the circumstances. Inadmissible.

## §–6 PRISON CONDITIONS

When a person who is mentally ill, or who is disabled or suffering from physical ill-health, is detained in prison pending trial or sentence, or such a person is sentenced to a term of imprisonment, this can raise issues under Articles 2 and 3 of the ECHR, and on occasions probably Article 5 also.

**ECHR ARTICLE 2 (RIGHT TO LIFE)**

The following cases deal with Article 2 obligations in relation to prison detainees.

Prison authorities must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them

186 X v United Kingdom, no. 7215/75, 5 November 1981, [1981] ECHR 6, (1982) 4 EHRR 188, §52, referring to Winterwerp v Netherlands, no 6301/73, 24 October 1979, Series A no. 33, 2 EHRR, §§ 57 and 60.

187 Panchenko v Russia, §117.

188 Turnbridge v United Kingdom (dec), European Commission, no. 16397/90, 17 May 1990.

will depend on the circumstances of the case.[189] In the case of mentally ill persons, regard must be had to their particular vulnerability.[190]

**Mental health cases**

In ***Keenan v United Kingdom (2001)***,[191] the applicant's son Mark Keenan had committed suicide by hanging while serving a prison sentence at HM Prison Exeter. Mr Keenan had been receiving anti-psychotic medication intermittently from the age of 21. His medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. Mrs Keenan alleged a violation of Article 2. In deciding whether there had been a violation, the court examined whether the authorities knew or ought to have known there was a real and immediate risk of the detainee committing suicide and whether they did all that could be reasonably expected of them, having regard to the nature of the risk. The court found that Mr Keen had not actually been diagnosed as suffering from schizophrenia. On the whole, the authorities responded reasonably to his conduct, placing him in hospital care and under watch when he showed suicidal tendencies. He was subject to daily medical supervision by the prison doctors, who on two occasions had consulted external psychiatrists with knowledge of his case. The prison doctors, who could have required his removal from segregation at any time, found him fit for segregation. On the day of his death there was no reason to alert the authorities that he was in a disturbed state of mind rendering a suicide attempt likely. It was not apparent therefore that the authorities omitted any step which should reasonably have been taken and the Article 2 complaint was not upheld.

In ***Renolde v France (2008)***,[192] the applicant was the sister of Joselito Renolde, who died aged 35 after hanging himself in a cell in Bois-d'Arcy Prison where he was being held in pre-trial detention. Three days after a suicide attempt in prison, he had been given most severe disciplinary penalty possible for an assault, namely 45 days detention in a punishment cell. The court examined whether the authorities knew or ought to have known that he posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent the risk. The court found that the authorities knew that Mr Renolde was suffering from psychotic disorders capable of causing him to commit acts of self-harm. The risk was real and he required careful monitoring in case of a sudden deterioration. The case could be distinguished from that of *Keenan* because, despite Mr Renolde's suicide attempt and diagnosed mental condition, there was never any discussion of whether he should be admitted to a psychiatric institution. Having regard to the state's obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that state authorities, knowing of such a risk, would take special measures geared to his condition to ensure its compatibility with continued detention. Given that the authorities did not order his admission to a psychiatric institution, they should at the very least have provided him with medical treatment corresponding to the seriousness of his condition. In fact, the evidence indicated that his medication was handed to him twice a week without any supervision of whether he took it. Expert toxicological reports revealed that at the time of his death he had not taken his neuroleptic medication for at least two to three days. This lack of supervision of his daily medication played a part in his death. It was also the case that the imposition of 45 days detention in a punishment cell could not be supported and was likely to have aggravated any existing risk of suicide. In the light of all these considerations, the authorities had failed to comply with their positive obligation to protect Mr Renolde's right to life. There had been a violation of Article 2.

189 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242, §92; Trubnikov v Russia, no. 49790/99, 5 July 2005, §70. A complaint under Article 3 was upheld; see below.

190 Aerts v Belgium, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64, §66; Keenan, supra, §111; Rivière v France, no. 33834/03, 11 July 2006, §63.

191 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242.

192 Renolde v France, no. 5608/05, 16 October 2008, [2008] ECHR 1085.

***Jasinska v Poland (2010)***[193] concerned the suicide of the applicant's grandson while he was serving a prison sentence. The applicant alleged that her grandson was able to steal medicines and kill himself as a result of negligence on the part of the prison authorities. The court held that there had been a violation of Article 2, finding that the Polish authorities had failed to comply with their obligation to protect the prisoner's life. The prison authorities had been informed of the deterioration in his health and should have considered him as a suicide risk, rather than simply renewing his medical prescriptions. There was a clear deficiency in a system that had allowed a first-time prisoner, who was mentally fragile and whose state of health had deteriorated, to gather a lethal dose of drugs without the knowledge of the medical staff responsible for supervising his medicine, and to subsequently commit suicide. The authorities' responsibility was not confined to prescribing medicines. It extended to ensuring that they were properly taken, in particular in the case of mentally disturbed prisoners.

In ***De Donder and De Clippel v Belgium (2011),***[194] the applicants' son was convicted and sentenced to a special regime because he was receiving psychiatric treatment. Subsequently, he was transferred to the ordinary section of the prison and even spent several days segregated in a punishment cell. He committed suicide. The court noted that the applicants' son had been detained under the Social Protection Act. This provided that the persons to whom it was applicable were not subject to the rules on ordinary detention but to the rules on compulsory admission, so that they could be given the psychological and medical support their condition required. Furthermore, the decision by the deputy public prosecutor recalling the deceased to prison had specified that he should be admitted to the psychiatric wing. Accordingly, the applicants' son should never have been held in the ordinary section of a prison. By holding him there in breach of domestic law, the authorities had contributed to the risk of him committing suicide. On the facts there had been a violation of the substantive aspect of Article 2. The court could not find any evidence that the state's investigation had not satisfied the requirements of an effective investigation. There was no violation of Article 2 in its procedural aspect.

The case of ***Ketreb v France (2012)***[195] concerned the suicide in prison by hanging of a drug addict. His sisters alleged that the French authorities had failed to take proper steps to protect their brother's life when he was placed in the prison's disciplinary cell. They also complained that the disciplinary measure was unsuitable for a person in his state of mind. The court held that there had been a violation of Article 2, finding that the French authorities had failed in their positive obligation to protect Mr Ketreb's right to life. It must have been clear to both the prison authorities and medical staff that his state was critical and placing him in a disciplinary cell had only made matters worse. That should have led the authorities to anticipate a suicidal frame of mind, which had already been noted during a previous stay in the punishment block some months earlier, and should, for example, have alerted the psychiatric services. Nor had the authorities set in place any special measures, such as appropriate surveillance or regular searches, which might have found the belt he used to commit suicide. There was also a violation of Article 3.

The case of ***Coselav v Turkey (2012)***[196] concerned a 16-year-old juvenile's suicide in an adult prison. His parents alleged that the Turkish authorities had been responsible for the suicide of their son and that the ensuing investigation into his death had been inadequate. The court held that there had been a violation of Article 2 in relation to both its substantive and procedural limbs. The Turkish authorities had been indifferent to the deceased's grave psychological problems, even threatening him with disciplinary sanctions for previous suicide attempts. They had also been responsible for a deterioration of his state of mind by detaining him in prison with adults without providing any medical or specialist

193 Jasinska v Poland, no. 28326/05, 1 June 2010.
194 De Donder and De Clippel v Belgium, no. 8595/06, 6 December 2011.
195 Ketreb v France, no. 38447/09, 19 July 2012.
196 Coselav v Turkey, no. 1413/07, 9 October 2012.

care, thus leading to his suicide. Furthermore, the Turkish authorities had failed to carry out an effective investigation to establish who had been responsible for the applicants' son's death, and how.

In ***Ionel Garcea v Romania (2015)***,[197] which concerned access to proper medical treatment for a mentally-ill prisoner whilst in detention, the court found that the ineffectiveness of the investigation and the time it had taken the authorities to establish the circumstances of the prisoner's death amounted to a procedural breach of Article 2. In particular, the prosecutor's office had not dealt with the complaint of ill-treatment in detention lodged by the applicant association.

In ***Isenc v France (2016)***,[198] the applicant's son had committed suicide 12 days after he was admitted to prison. The applicant alleged a violation of his son's right to life. The court held that there had been a violation of Article 2. Although provided for in the domestic law, the arrangements for collaboration between the prison and medical services in supervising inmates and preventing suicides had not worked. The court noted that a medical check-up of the deceased when he was admitted was required as a minimum precautionary measure. Although the government submitted that he had received such a medical consultation, it failed to furnish any documentary evidence corroborating this and had not proved that he had been examined by a doctor. In the absence of any proof of an appointment with the prison medical service, the court considered that the authorities had failed to comply with their positive obligation to protect the applicant's son's right to life.

**Drug dependency cases**

In **Marro and Others v. Italy (2014),**[199] the applicants were the relatives of a detained drug addict who died in prison as a result of an overdose. Relying on Article 2, they blamed the Italian authorities for failing to prevent their relative from obtaining the substances which led to his death. The ECtHR declared the application inadmissible as being manifestly ill-founded. The fact that the deceased had been able to obtain and make use of drugs could not, in itself, make the Italian state liable for the death in question. The applicants had not alleged that the authorities were aware of information which could have led them to believe that their relative was in a particularly dangerous position compared to any other prisoner suffering from drug addiction. Moreover, no failing could be identified on the part of the prison staff. Indeed, they had undertaken numerous measures (searches, inspection of parcels, etc.) to prevent drugs from being brought into prisons.

The case of ***Patsaki and Others v Greece (2019)***[200] also concerned the death of a drug addict in prison. The applicants complained that the Greek State had not complied with its positive obligation to protect their relative's life in prison. The ECtHR held that there had been a violation of the procedural limb of Article 2 in that the length of the judicial investigation (four years and eight months) had breached the requirements of diligence and promptness for an effective investigation. There had been no violation of Article 2 under its substantive limb because the circumstances of the death did not clearly point to any state responsibility.

**Other cases**

In ***Kats and Others v Ukraine (2008)***,[201] the deceased had suffered from schizophrenia and was infected with HIV. It was alleged that the state had failed to provide her with adequate medical care during her pre-trial detention. The ECtHR found that she was refused access to a specialist hospital or

197 Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v Romania no. 2959/11, 24 March 2015.
198 Isenc v France, no. 58828/13, 4 February 2016.
199 Marro and Others v Italy, no. 29100/07 (Dec.), 8 April 2014.
200 Patsaki and Others v Greece, no. 20444/14, 7 February 2019.
201 Kats and Others v Ukraine, no. 29971/04, 18 December 2008.

the prison's medical wing and had been provided with a striking lack of medical attention to her health problems. The Ukrainian Government had not contested the accuracy of a report which concluded that inadequate medical assistance had indirectly caused her death. There had been a violation of Article 2.

In ***Dzieciak v. Poland (2008)***,[202] a detainee suffering from a serious heart disease died after almost four years in pre-trial detention. The Court found that the numerous failings on the part of the authorities – such as keeping the applicant in a detention facility without a hospital wing, cancelling his bypass surgery on three occasions and prolonging his detention despite medical opinion to the contrary – constituted a breach of the substantive limb of Article 2. Furthermore, the investigation into the applicant's death had lasted more than two years and been discontinued by the prosecutor without consideration of the concerns that had been raised by medical experts over the decisions to postpone the applicant's surgery on three occasions. More importantly, the incomplete and inadequate character of the investigation was highlighted by the fact that the exact course of events directly preceding the applicant's death had never been established. The authorities had thus failed to carry out a thorough and effective investigation into the allegation that the applicant's death was caused by ineffective medical care during his pre-trial detention.

In ***Salakhov and Islyamova v. Ukraine (2013)***,[203] the first applicant, who was HIV positive, was placed in pre-trial detention where his health sharply deteriorated. A specialist diagnosed him with pneumonia and candidosis and concluded that the HIV infection was at the fourth clinical stage, but that there was no urgent need for hospitalisation. The ECtHR issued an interim measure under Rule 39 requiring the first applicant's immediate transfer to hospital for treatment. However, he was only transferred three days later and was kept under constant guard by police officers while allegedly still handcuffed to his bed. He was ultimately sentenced to the payment of a fine but remained in detention for two weeks after the verdict as a preventive measure, despite his critical condition. He died two weeks after his release. The Court found that there had been violations of Article 3 in respect of the inadequate medical assistance provided in the detention facilities and hospital and of his handcuffing in the hospital. It also found violations of Article 2 in respect of the authorities' failure to protect his life and to conduct an effective investigation into the circumstances of his death. Lastly, it found a violation of Article 3 in respect of the mental suffering endured by the second applicant, the first applicant's mother.

**ECHR ARTICLE 3 (INHUMAN OR DEGRADING TREATMENT)**

The following cases deal with Article 3 obligations in relation to prison detainees.

**Prisons, prison conditions and medical treatment**

Article 3 requires the state to ensure that:

- prisoners are detained in conditions which are compatible with respect for human dignity;
- the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention;
- given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance.[204]

202 Dzieciak v. Poland no. 77766/01 9 December 2008.

203 Salakhov and Islyamova v. Ukraine, no. 28005/08, 14 March 2013.

204 See Hurtado v Switzerland, no. 17549/90, 28 January 1994, Series A no. 280-A, §79; Mouisel v France, no. 67263/01, 14 November 2002, ECHR 2002-IX, (2002) ECHR 740, §40.

The Convention does not impose a general obligation on state authorities to release detainees on health grounds, or to transfer them to a civil hospital in order to provide particular treatment, even if the person is suffering from an illness that is particularly difficult to treat.[205] However, the detention of a person who is ill can raise issues under Article 3, and a lack of appropriate medical care can amount to inhuman or degrading treatment contrary to that provision:

> *'The court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 ... and that the lack of appropriate medical care may amount to treatment contrary to that provision ... In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment ...*
>
> *... [T]here are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant ...'*[206]

**Positive obligations**

It was noted above that under Article 3 the state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility. Thus, for example, states may be under a positive obligation to prevent the spreading of contagious disease. After finding a structural problem of inadequate medical care in Georgian prisons, the court required the Georgian authorities to take the necessary legislative and administrative measures to prevent the spreading of contagious diseases, such as tuberculosis and hepatitis, in the prisons, to introduce a screening system for prisoners upon admission and to guarantee prompt and effective treatment (***Poghosyan v. Georgia (2009)***[207] and ***Ghavtadze v. Georgia (2009)***[208] ).

Positive obligations may also arise under Articles 5 and 8.

**Prison conditions (overcrowding, lack of basic hygiene, lack of food, etc)**

There have been many cases on the inadequacy of prison conditions:

In **Peers v. Greece (2001)**,[209] the applicant was first detained in the prison's psychiatric hospital before being moved to segregation units. He complained about the conditions of his detention. The European Court of Human Rights held that there had been a violation of Article 3. The applicant had to spend a considerable part of each 24-hour period practically confined to his bed in a cell, with no ventilation and no window, which would at times become unbearably hot. He also had to use the toilet in the presence of another inmate and be present while the toilet was being used by his cellmate. The prison conditions had diminished his human dignity and given rise in him to feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.

205 Mouisel v France, no. 67263/01, 14 November 2002, ECHR 2002-IX, (2002) ECHR 740, §37.
206 Sławomir Musiał v Poland, no. 28300/06, 20 January 2009, §§87-88.
207 Poghosyan v. Georgia, no. 9870/07, 24 February 2009.
208 Ghavtadze v. Georgia (2009) no 23204/07 3 March 2009.
209 Peers v. Greece (2001), no. 28524/95, 19 April 2001.

In ***Kalashnikov v. Russia (2002)***,[210] the applicant spent almost five years in pre-trial detention before being acquitted. He complained about the conditions in the detention centre where he was held. His cell was overcrowded (24 prisoners sharing 17 square metres), it was impossible to sleep properly as the TV and cell light were never turned off, his cell was overrun with cockroaches and ants, and he contracted skin diseases and fungal infections, losing his toenails and some fingernails as a result. The court found a violation of Article 3. As regards the overcrowding, the court emphasised that the European Committee for the Prevention of Torture (CPT) had set 7m² per prisoner as an approximate desirable guideline for a cell.

***Modârcă v. Moldova (2007)***[211] concerned an applicant suffering from osteoporosis who spent nine months of his pre-trial detention in a 10m² cell with three other detainees. The cell had very limited access to daylight; it was not properly heated or ventilated; and electricity and water supplies were periodically discontinued. The applicant was not provided with bed linen or prison clothes; the dining table was close to the toilet, and the daily expenses for food were limited to 0.28 euros for each detainee. The ECtHR concluded that the cumulative effect of the conditions and the time the applicant he had been forced to endure them amounted to a violation of Article 3. The Court further observed that the European Committee for the Prevention of Torture (CPT) had reported that the food was 'repulsive and virtually inedible' following a visit to the prison in September 2004.

The applicant in ***Florea v. Romania (2010)***[212] suffered from chronic hepatitis and arterial hypertension. He was detained in prison from 2002 to 2005. For about nine months he had to share a cell that had only 35 beds with between 110 and 120 other prisoners. Throughout his detention he was kept in cells with other prisoners who were smokers. He complained of overcrowding, poor hygiene conditions, including having been detained with smokers, and of a diet unsuited to his medical conditions. The court found a violation of Article 3. The state had to ensure that all prisoners were not subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and that their health was not compromised.

The case of ***Ananyev and Others v. Russia (2012)*** concerned complaints by a number of applicants that they had been detained in inhuman and degrading conditions in remand centres whilst awaiting criminal trial. The applicants complained, in particular, that they had been held in overcrowded cells. The ECtHR found that the applicants had been subjected to inhuman and degrading treatment. The applicants had been given less than 1.25 square metres and 2 square metres of personal space and the number of detainees had significantly exceeded the number of sleeping places available. In addition, they had remained inside their cells all the time, except for a one hour period of outdoors exercise. They had also eaten their meals and used the toilet in those cramped conditions.

***Canali v. France (2013)***[213] concerned the conditions of detention in the Charles III Prison in Nancy, which was built in 1857 and shut down in 2009 on account of its extremely dilapidated state. The court held that there had been a violation of Article 3. The cumulative effect of the cramped conditions and failings in respect of hygiene regulations had aroused in the applicant feelings of despair and inferiority capable of debasing and humiliating him. These conditions of detention amounted to degrading treatment.

210 Kalashnikov v. Russia (2002), no. 47095/99, 15 July 2002.
211 Modârcă v Moldova, no. 14437/05, 10 May 2007.
212 Florea v Romania, no. 37186/03, 14 September 2010.
213 Canali v France, no. 40119/09, 25 April 2013.

The case of **Vasilescu v. Belgium (2014)**[214] concerned conditions in Antwerp and Merksplas Prisons. The ECtHR found a violation of Article 3 on account of overcrowding and insanitary conditions. While there was nothing to indicate a real intention to humiliate or debase the applicant, his physical conditions of detention had subjected him to hardship exceeding the unavoidable level of suffering inherent in detention, and amounted to inhuman and degrading treatment.

In ***Szafrański v. Poland (2015)***,[215] the applicant complained that in seven of the ten cells where he was detained the sanitary facilities were separated from the rest of the cell only by a 1.2 metre high fibreboard partition and had no doors. The Court held that there had not been a violation of Article 3. The only hardship the applicant had had to bear was the insufficient separation of the sanitary facilities from the rest of the cell. Apart from that, the cells were properly lit, heated and ventilated and he had access to various activities outside the cells. The overall circumstances had not caused distress and hardship which exceeded the unavoidable level of suffering inherent in detention, and did not exceed the threshold of severity under Article 3.

There had, however, been a violation of Article 8 (right to respect for private life) because the domestic authorities had a positive obligation to provide access to sanitary facilities separated from the rest of the prison cell in such a way as to ensure a minimum of privacy. The Court also noted that, according to the *European Committee for the Prevention of Torture (CPT)*, a sanitary annex which was only partially separated off was not acceptable in a cell occupied by more than one detainee. In addition, the CPT had recommended that a full partition in all the in-cell sanitary annexes be installed.

See also:

- ***Moisejevs v. Latvia (2006)*** [216] (applicant detained pending trial; complained that he had been denied food on the days he was transported from the prison to the regional court to attend the hearings of his criminal case; ECtHR found that the applicant had regularly suffered from hunger on the days of the hearings; violation of Article 3);
- ***Orchowski v. Poland (2009)*** [217] (serving a prison sentence since 2003, the applicant had been transferred twenty-seven times between eight different prisons and remand centres. For most of the time he had less than 3 square metres of personal space inside his cells, which was the minimum prescribed under Polish law. At times he even had less than 2 square metres; the lack of space had been made worse by aggravating factors, such as lack of exercise, particularly outdoor exercise, lack of privacy, insalubrious conditions and frequent transfers; violation of Article 3);
- ***Mandic and Jovic v. Slovenia and Štrucl and Others v. Slovenia (2011)*** [218] (applicants held for several months in cells in which the personal space available to them was 2.7 square metres and in which the average afternoon temperature in August was approximately 28°C; violation of Article 3);
- ***Torreggiani and Others v. Italy (2013)*** [219] (overcrowding in Italian prisons; living space in cells of 4 square metres per person exacerbated by other conditions such as the lack of hot water over long periods, and inadequate lighting and ventilation; violation of Article 3);

214 Vasilescu v Belgium, no. 64682/12, 18 March 2014.
215 Szafrański v Poland, no. 17249/12, 15 December 2015.
216 Moisejevs v Latvia, no. 64846/01, 15 June 2006.
217 Orchowski v Poland, no. 17885/04, 22 October 2009.
218 Mandic and Jovic v Slovenia and Štrucl and Others v. Slovenia, nos. 5903/10, 6003/10 and 6544/10, 20 October 2011.
219 Torreggiani and Others v Italy, no. 43517/09, 8 January 2013 (pilot judgment).

- ***Varga and Others v. Hungary (2015)*** [220] (widespread overcrowding; limited personal space available to all six detainees in the case, aggravated by a lack of privacy when using the lavatory, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells; violation of Article 3);

- ***Muršić v. Croatia*** **(2016)**[221] (ECtHR confirmed that 3 sq. of surface area per detainee in a multi-occupancy cell was the prevalent norm in its case-law, being the applicable minimum standard for the purposes of Article 3. When that area fell below 3 sq. m, the lack of personal space was regarded as so serious that it gave rise to a strong presumption of a violation of Article 3);

- ***Rezmiveș and Others v. Romania (2017)***[222] (overcrowded cells, inadequate sanitary facilities, lack of hygiene, poor-quality food, dilapidated equipment, presence of rats and insects in cells; violation of Article 3);

- ***Valentin Baştovoi v. the Republic of Moldova (2017)***[223] (poor conditions of prison detention; violation of Article 3);

- ***Koureas and Others v. Greece (2018)*** [224] (the evidence submitted was inadequate; ECtHR unable to find that the applicants' overall conditions of detention exceeded the unavoidable level of suffering inherent in detention and amounted to degrading treatment; lack of personal space had not been coupled with inadequate physical conditions of detention);

- ***Pocasovschi and Mihaila v. the Republic of Moldova and Russia (2018)*** [225] (Moldovan prison; lack of water, electricity, food and warmth; violation of Article 3).

**Conditions of detainees said to require special security**

In ***Ilascu and Others v. Moldova and Russia (2004)***,[226] the first applicant complained that while on death row he had no contact with other prisoners, no news from the and no right to contact his lawyer or receive regular visits from his family. His cell was unheated, he was deprived of food as a punishment and he was able to take showers only very rarely. These conditions and a lack of medical care caused his health to deteriorate. The court held that as a whole these conditions amounted to torture, in violation of Article 3.

In ***Ramirez Sanchez v. France (2006)***,[227] the applicant, an international terrorist known as 'Carlos the Jackal', was detained in solitary confinement for eight years following his conviction for terrorist-related offences. He was segregated from other prisoners, but had access to TV and newspapers, and was allowed to receive visits from family and lawyers. The ECtHR held that there had been no violation of Article 3. Having regard to the applicant's character and the danger he posed, the conditions in which he had been held had not reached the minimum level of severity necessary to constitute inhuman or degrading treatment.

220 Varga and Others v Hungary , nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015 (pilot judgment).
221 Muršić v Croatia [GC], no. 7334/13, 20 October 2016.
222 Rezmiveș and Others v Romania (pilot judgment), nos. 61467/12, 39516/13, 48213/13 and 68191/13, 25 April 2017.
223 Valentin Baştovoi v the Republic of Moldova, no. 40614/14, 28 November 2017.
224 Koureas and Others v Greece, no. 30030/15, 18 January 2018.
225 Pocasovschi and Mihaila v the Republic of Moldova and Russia, no. 1089/09, 29 May 2018.
226 Ilascu and Others v Moldova and Russia [GC], no. 48787/99, 8 July 2004.
227 Ramirez Sanchez v France [GC], no. 59450/00, 4 July 2006.

In ***Khider v. France (2009)***, the applicant, who was on remand, complained of his detention conditions and the security measures imposed on him as a 'prisoner requiring special supervision'. The Court held that there had been a violation of Article 3. The applicant's conditions of detention, his classification as a high-security prisoner, his repeated transfer from prison to prison, his lengthy solitary confinement and the frequent full body searches he was subjected to all added up to inhuman and degrading treatment. Note, however, that in a subsequent case, ***Khider v. France (2013)***,[228] the applicant's complaints under Article 3 in respect of frequent changes of establishment, prolonged periods in solitary confinement and strip-searches were declared inadmissible.

The applicant in ***Payet v. France (2011)***[229] was serving a prison sentence for murder. He complained about his frequent moving between cells and prison buildings for security reasons and the disciplinary penalty to which he was subjected, which entailed placement in cells lacking natural light and proper hygienic conditions. The Court found a violation of Article 3 with regard to the poor conditions of detention in the punishment wing where the applicant was placed (dirty and dilapidated premises, flooding, lack of sufficient light for reading and writing). However, there had been no violation of Article 3 as regards the security rotations.

The cases of ***Piechowicz v. Poland (2012)***[230] and ***Horych v. Poland (2012)***[231] both concerned a regime in Polish prisons for detainees who were classified as dangerous. The European Court of Human Rights found a violation of Articles 3. Keeping detainees under the regime for several years, in isolation, without sufficient mental and physical stimulation, and without examining if there were concrete reasons for the prolonged application of that regime, was unnecessary in order to ensure safety in prison.

In ***Öcalan v. Turkey (no. 2) (2014)***,[232] the applicant, who was the founder of the PKK (Kurdistan Workers' Party), an illegal organisation, complained about his social isolation and the restrictions on his communication with members of his family and his lawyers in prison on the island of İmralı, where he was held in solitary confinement until 17 November 2009. The Court held that taken overall the duration and degree of social isolation constituted a violation of Article 3.

The case of ***Harakchiev and Tolumov v. Bulgaria (2014)***[233] concerned the life imprisonment without commutation of the first applicant and the strict detention regime, involving isolation, in which he and the second applicant, another life prisoner, were held. The court held that there had been a violation of Article 3. As concerned the strict detention regime, the cumulative effect of the conditions, which included isolation, inadequate ventilation, lighting, heating, hygiene, food and medical care, had been inhuman and degrading. The applicants' isolation appeared to be the result of the automatic application of domestic legal provisions regulating the prison regime rather than any particular security concerns relating to their behaviour.

In the case of ***Ilgiz Khalikov v. Russia (2019)***,[234] a prisoner had been seriously wounded by a stray bullet during a shoot-out between escorting officers and detainees attempting to escape during their transfer to another facility. The Court held that there had been a violation of Article 3. The state had been responsible for the applicant's injury because the escorting officers had disregarded the regulations put in place for the security of detainees during transfers.

228 Khider v France, no. 56054/12, 1 October 2013 (dec).
229 Payet v France, no. 19606/08, 20 January 2011.
230 Piechowicz v Poland, no. 20071/07, 17 April 2012.
231 Horych v Poland, no. 13621/08, 17 April 2012.
232 Öcalan v Turkey (no. 2), nos. 24069/03, 197/04, 6201/06 and 10464/07, 18 March 2014.
233 Harakchiev and Tolumov v Bulgaria, nos. 15018/11 and 61199/12, 8 July 2014.
234 Ilgiz Khalikov v Russia, no. 48724/15, 15 January 2019.

*Passive smoking*

The applicant in ***Elefteriadis v. Romania (2011)*** [235] suffered from chronic pulmonary disease and was serving a life sentence. Between February and November 2005, he was placed in a cell with two prisoners who smoked. In the waiting rooms of the courts where he was summoned to appear on several occasions between 2005 and 2007, he was also held together with prisoners who smoked. The court held that there had been a violation of Article 3. The state is required to take measures to protect a prisoner from the harmful effects of passive smoking where, as in the applicant's case, medical examinations and the advice of doctors indicated that this was necessary for health reasons.

See also ***Florea v. Romania (2010)***[236] (applicant had never had an individual cell and had had to tolerate his fellow prisoners' smoking even in the prison infirmary and the prison hospital, against his doctor's advice; violation of Article 3).

**Detainees with physical disabilities**

Where persons with disabilities are detained, the authorities must take care to provide conditions that meet any special needs resulting from the person's disability.[237]

The applicant in ***Vincent v France (2006)***[238] was serving a ten-year prison sentence imposed in 2005. He had experienced paraplegia since an accident in 1989 and could not move around without the aid of a wheelchair. He complained that the conditions in which he was detained in different prisons were not adapted to his disability. The court found a violation of Article 3. **I**t had been impossible for the applicant to move autonomously around Fresnes Prison, which was particularly unsuited to the imprisonment of persons with a physical handicap who could move about only in a wheelchair. The circumstances amounted to degrading treatment.

In ***Serifis v. Greece (2006)***,[239] the applicant's left hand has been paralysed since a road-traffic accident and he also suffered from multiple sclerosis. He complained that his continued detention amounted to inhuman treatment. The court found a violation. The Greek authorities had procrastinated in providing him with medical assistance corresponding to his actual needs and had subjected him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

In ***Hüseyin Yıldırım v. Turkey (2007)***,[240] the applicant suffered from paresis on the left side and general hyperesthesia. He was arrested on 5 July 2001. On 17 July 2001 the applicant was diagnosed with quadriparesis and atrophy of the hands, and declared medically unfit to remain incarcerated. His state of health deteriorated during his detention. On 13 November 2001, he was obliged to undergo a bifrontal craniotomy on account of a rupture of the cerebral membrane, which was causing a discharge of cerebral fluid. He subsequently began to suffer from sphincterial problems, requiring him to wear a urethral catheter, and was subject to various more or less serious dermatological, neurological or respiratory illnesses; he also showed signs of chronic depression. In January 2002 specialist board No. 3 from the Istanbul Institute of Forensic Medicine held that his state of health was incompatible with his imprisonment. He alleged that the circumstances in which he had been detained had amounted to inhuman and degrading treatment.

235 Elefteriadis v Romania, no. 38427/05, 25 January 2011.
236 Florea v Romania, no. 37186/03, 14 September 2010.
237 Price v the United Kingdom, no. 33394/96, 10 July 2001.
238 Vincent v France, no. 6253/03, 24 October 2006.
239 Serifis v Greece, no. 27695/03, 2 November 2006.
240 Hüseyin Yıldırım v Turkey, no. 2778/02, 3 May 2007.

The court held that there had been a violation of Article 3 The time the applicant had spent in detention had infringed his dignity and had certainly caused him both physical and mental hardship beyond that inevitably associated with imprisonment and medical treatment. During transfers, responsibility for him had been placed in the hands of gendarmes who were not qualified to foresee the medical risks involved in moving a disabled person. Moreover, although the highest medical authorities, including forensic experts, had strongly recommended his early release, stressing the permanent nature of his illness and the unsuitability of prison conditions for a person in his medical condition, his imprisonment had continued.

In ***Arutyunyan v. Russia (2012)***,[241] the applicant was wheelchair-bound and had numerous health problems, including a failing renal transplant, very poor eyesight, diabetes and serious obesity. His cell was on the fourth floor of a building without an elevator; the medical and administrative units were located on the ground floor. Owing to the absence of an elevator, the applicant was required to walk up and down the stairs on a regular basis to receive haemodialysis and other necessary medical treatment. The court held that there had been a violation of Article 3. The domestic authorities had failed to treat the applicant in a safe and appropriate manner consistent with his disability, and had denied him effective access to the medical facilities, outdoor exercise and fresh air. For a period of almost 15 months, the applicant was forced at least four times a week to go up and down four flights of stairs on his way to and from lengthy, complicated and tiring medical procedures that were vital to his health. The effort had undoubtedly caused him unnecessary pain and exposed him to an unreasonable risk of serious damage to his health.

In ***DG v Poland (2013)***,[242] the court found that the conditions of detention of a paraplegic prisoner, who was confined to a wheelchair and suffered from incontinence, were inadequate: he did not have daily access to the shower rooms and could not reach the toilets without help from other inmates.

In contrast, in ***Zarzycki v Poland (2013)***,[243] the court found that the authorities had provided the applicant, a prisoner amputated at both elbows, with the regular and adequate assistance his special needs warranted. In these circumstances, even though his disability made him more vulnerable to the hardships of detention, his treatment had not reached the threshold of severity required to constitute degrading treatment within the meaning of Article 3.

In ***Grimailovs v Latvia*** **(2013)**,[244] the applicant complained that the prison facilities were unsuitable for him as he was paraplegic and wheelchair-bound. The court held that there had been a violation of Article 3. The applicant had been detained for nearly two-and-a-half years in a regular detention facility which was not adapted for persons in a wheelchair. Moreover, he had had to rely on his fellow inmates to assist him with his daily routine and mobility around the prison, even though they had not been trained and did not have the necessary qualifications. The state's obligation to ensure adequate conditions of detention included making provision for the special needs of prisoners with physical disabilities, and the state could not absolve itself from that obligation by shifting the responsibility to cellmates. The applicant's inability to have independent access to various prison facilities, including sanitation facilities, and the lack of any organised assistance with his mobility around the prison or his daily routine, had reached the threshold of severity required to constitute degrading treatment.

241 Arutyunyan v Russia, no. 48977/09, 10 January 2012.
242 DG v Poland, no. 45705/07, 12 February 2013.
243 Zarzycki v Poland, no. 15351/03, 6 March 2013.
244 Grimailovs v Latvia, no. 6087/03, 25 June 2013.

The applicant in ***Semikhvostov v Russia*** **(2014)**[245] was paralysed from the waist down and confined to a wheelchair. He alleged that the facility where he had been detained for almost three years was unsuitable for his condition. The Court found a violation of Article 3. The applicant lacked independent access to parts of the facility, including the canteen and sanitation blocks. This, together with the lack of any organised assistance with his mobility, must have caused him unnecessary and avoidable mental and physical suffering amounting to inhuman and degrading treatment.

In ***Amirov v. Russia (2014),***[246] the applicant was a paraplegic wheelchair-bound detainee suffering from a long list of illnesses. The authorities had denied him access to medical experts of his choice and failed to organise an expert medical examination in disregard of the interim measure indicated by the court. Moreover, they failed to demonstrate that the applicant had been receiving effective medical treatment for his illnesses, which led the court to conclude to a violation of Article 3 of the Convention. Under Article 46 of the Convention, the court indicated that the respondent state should admit the applicant to a specialised medical facility where he would be provided with adequate medical treatment, and should regularly re-examine his situation, including with the assistance of independent medical experts.

The applicant in **Helhal v. France (2015)**[247] experienced paraplegia of the lower limbs and urinary and faecal incontinence. He complained that, in view of his severe disability, his continuing detention amounted to inhuman and degrading treatment. The court held that there had been a violation of Article 3. Although the applicant's continuing detention did not in itself constitute inhuman or degrading treatment, the inadequacy of the physical rehabilitation treatment provided to him, and the fact that the prison premises were not adapted to his disability, amounted to a breach of Article 3. The assistance washing himself which was provided by a fellow inmate in the absence of showers suitable for persons of reduced mobility did not suffice to fulfil the state's obligations with regard to health and safety.

In ***Topekhin v. Russia (2016)***,[248] the applicant was a remand prisoner who suffered from serious back injuries, paraplegia and bladder and bowel dysfunction. He complained of the conditions of his detention and of his transfer to a correctional colony. The court held that there had been a violation of Article 3. The applicant's inevitable dependence on his fellow inmates, and the need to ask for their help with intimate hygiene procedures, had put him in a very uncomfortable position. It adversely affected his emotional well-being and impeded his communication with the cellmates who had to perform this burdensome work involuntarily. The conditions had further been exacerbated by the failure to provide him with a hospital bed or other equipment, such as a special pressure-relieving mattress, affording a minimum of comfort. With regard to his transfer, the material conditions of the transfer and the duration of the trip had been serious enough to qualify as inhuman and degrading treatment.

The case of ***Ābele v Latvia*** **(2017)**[249] 'concerned the complaint by a deaf and mute prisoner who alleged that he had been held in overcrowded cells and that the authorities had failed to cater for his disability. That had led to his being isolated'. The court found that Mr Ābele had lacked the necessary amount of personal space in the cells where he had been held and had suffered anguish and feelings of inferiority due to his inability to communicate that had attained the threshold of inhuman and degrading treatment.

245 Semikhvostov v Russia, no. 2689/12, 6 February 2014.
246 Amirov v Russia, no. 51857/13, 27 November 2014.
247 Helhal v France, no. 10401/12 19 February 2015.
248 Topekhin v Russia, no. 52089/09 10 May 2016.
249 Ābele v Latvia (2017), nos. 60429/12 and 72760/12, 5 October 2017.

*Dependence on fellow inmates*

In ***Farbtuhs v. Latvia (2004)***,[250] the applicant, who had a physical disability, was assisted during working hours by the prison medical staff and outside working hours by other inmates on a voluntary basis. The court expressed concern about the appropriateness of such a practice, which left the bulk of responsibility for a man with such a severe disability in the hands of unqualified prisoners, even if only for a limited period. (The case is further dealt with below: see Obligation to release prisoners on health grounds).

In ***Semikhvostov v Russia (2014),***[251] the ECtHR went further, holding that the state's obligation to ensure adequate conditions of detention includes making provision for the special needs of prisoners with physical disabilities. The state cannot absolve itself from that obligation by shifting the responsibility onto other inmates. By appointing fellow inmates to care for the applicant, the state had not taken the necessary steps to remove the environmental and attitudinal barriers which had seriously impeded his ability to participate in daily activities with the general prison population. This had precluded his integration and stigmatised him even further.

See also: ***Topekhin v. Russia (2016)***,[252] *supra*.

**Obligation to release prisoners on health grounds**

The Convention does not impose a general obligation to release detainees on health grounds or to place them in a civil hospital in order to receive particular treatment.

In ***Papon v. France (2001)***,[253] the applicant, who was serving a prison sentence for aiding and abetting crimes against humanity, was 90 years old when he lodged his complaint. He maintained that keeping a man of his age in prison was contrary to Article 3, and that the conditions of detention in prison were not compatible with extreme old age and his state of health. The court declared the application inadmissible (manifestly ill-founded). It did not exclude the possibility that in certain conditions the detention of an elderly person over a lengthy period might raise an issue under Article 3 but pointed out that regard was to be had to the particular circumstances of each specific case. In the instant case, the applicant's treatment had not reached the level of severity required to bring it within the scope of Article 3. While he had heart problems, his overall condition had been described as 'good' in an expert report.

The applicant in ***Farbtuhs v. Latvia (2004)***[254] was found guilty of crimes against humanity and genocide for his role in the deportation and deaths of Latvians during the Stalinist era. He complained that, in view of his age and infirmity, and the Latvian prisons' incapacity to meet his specific needs, his prolonged imprisonment had constituted treatment contrary to Article 3. In 2002 the domestic courts finally excused the applicant from serving the remainder of his sentence after finding *inter alia* that he had contracted two further illnesses while in prison and that his condition generally had deteriorated.

The court held that there had been a violation of Article 3. The applicant was 84 years old when he was sent to prison, paraplegic and disabled to the point of being unable to attend to most daily tasks unaided. Moreover, when taken into custody he was already suffering from a number of serious illnesses, the majority of which were chronic and incurable.

250 Farbtuhs v Latvia, no. 4672/02 2 December 2004.
251 Semikhvostov v Russia, no. 2689/12, 6 February 2014.
252 Topekhin v Russia, no. 52089/09, 10 May 2016.
253 Papon v France, no. 54210/00, 7 June 2001 (dec.).
254 Farbtuhs v Latvia, no. 4672/02, 2 December 2004.

The court considered that when national authorities decided to imprison such a person, they had to be particularly careful to ensure that the conditions of detention were consistent with the specific needs arising out of the prisoner's infirmity. Having regard to the circumstances of the case, the court found that, in view of his age, infirmity and condition, the applicant's continued detention had not been appropriate. The situation in which he had been put was bound to cause him permanent anxiety and a sense of inferiority and humiliation so acute as to amount to degrading treatment within the meaning of Article 3 of the Convention.

In ***Tekin Yıldız v. Turkey (2005)***,[255] the applicant had been sentenced to a prison term for membership of a terrorist organisation. He went on hunger strike and developed Wernicke-Korsakoff syndrome as a result. His sentence was suspended until he had made a complete recovery. He was then rearrested and, despite an early ruling that he had no case to answer, remained in prison for eight months.[256] The court observed that his state of health had been consistently found to be incompatible with detention, and the eight months period of detention despite the lack of change in his condition was incompatible with Article 3.

See also ***Hüseyin Yıldırım v. Turkey (2007)***,[257] supra.

In ***Gülay Çetin v. Turkey (2013)***,[258] the detainee was suffering from terminal cancer. The Court observed that, in accordance with Article 3, the health of prisoners sometimes called for humanitarian measures, particularly where an issue arose as to the continued detention of a person whose condition was incompatible in the long term with a prison environment. During the final stages of Ms Çetin's illness, the stress inherent in prison life had had repercussions on her life expectancy and health. At a time when she had become incapable of carrying out everyday activities unaided, she had been placed under the supervision of people with no qualifications in this area (prison staff, fellow prisoners, her sister). The conditions of her detention, both before and after her final conviction, had amounted to inhuman and degrading treatment, and she had been discriminated against because, while in pre-trial detention, she had not been eligible for the protective measures applicable to convicted prisoners suffering from serious illnesses. There had been a violation of Article 3.

See also: ***Dorneanu v. Romania (2017)***[259] (the applicant had terminal metastatic prostate cancer and eventually died after eight months in detention; he complained that his immobilisation in his hospital bed had amounted to inhuman treatment and that his state of health was incompatible with detention; violation of Article 3; the authorities had not taken into account the realities of the applicant's personal situation, and had not examined whether in practice he was fit to remain in detention).

**Medical care in prison for persons suffering from physical illness**

There have been numerous cases involving complaints about inadequate medical care in prison:

255 Tekin Yıldız v Turkey, no. 22913/04, 10 November 2005.

256 The European Court of Human Rights conducted a fact-finding mission to Turkey in connection with a group of 53 similar cases, inspecting prisons together with a committee of experts with a mandate to assess the applicants' medical fitness to serve custodial sentences.

257 Hüseyin Yıldırım v Turkey, no. 2778/02, 3 May 2007.

258 Gülay Çetin v Turkey, no. 44084/10, 5 March 2013.

259 Dorneanu v Romania, no. 55089/13, 28 November 2017.

*Cases where a violation was established*

In ***Mouisel v. France (2002)***,[260] the applicant was diagnosed with lymphatic leukaemia in 1999. When his condition worsened, he underwent chemotherapy sessions in a hospital during the day. He was put in chains during the journey to hospital, and he claimed that during the chemotherapy sessions his feet were chained and one of his wrists attached to the bed. He decided to stop the treatment in 2000, complaining of these conditions and of the guards' aggressive behaviour towards him.

The court found a violation of Article 3. Although his condition had become increasingly incompatible with his continued detention as his illness progressed, the prison authorities had failed to take any special measures. In view of his condition, the fact that he had been admitted to hospital and the nature of the treatment, the court considered that handcuffing the applicant had been disproportionate to the security risk posed. This treatment further fell foul of the recommendations of the *European Committee for the Prevention of Torture (CPT)* regarding the conditions in which prisoners are transferred and medically examined.

In the case of ***McGlinchey and Others v. United Kingdom (2003)***,[261] a close relative of the applicants died in prison as a consequence of severe heroin withdrawal symptoms. She had suffered serious weight loss and dehydration as a result of a week of largely uncontrolled vomiting and inability to eat or hold down liquids. Having observed several failings by the prison authorities in the provision of adequate medical care, the court found a violation of Article 3. When a lack of appropriate medical care results in a detainee's death, it may also raise an issue under the substantive and/or procedural limb of Article 2 of the Convention.

In ***Holomiov v. the Republic of Moldova (2006)***,[262] the applicant suffered from serious kidney diseases. The court held that there had been a violation of Article 3. He had been detained for almost four years without appropriate medical care for serious kidney diseases, entailing serious risks for his health. This constituted inhuman and degrading treatment.

In ***Testa v. Croatia (2007)***, [263] a lack of requisite medical care and assistance for the applicant's chronic hepatitis, coupled with the prison conditions which she had had to endure for more than two years, violated Article 3.

The case of ***Aleksanyan v. Russia (2008)***[264] concerned the lack of medical assistance to a HIV-positive detainee. In November 2007, the court invited the Russian Government to secure immediately the applicant's in-patient treatment at a hospital which specialised in the treatment of AIDS and concomitant diseases. In February 2008, the trial in the applicant's case was suspended due to his poor health. He was placed in an external haematological hospital where he was guarded round-the-clock by policemen; the windows of his room were covered with an iron grill. He was still there when the court adopted its judgment. The court found that the national authorities had failed to take sufficient care of the applicant's health at least until his transfer to an external hospital. This had undermined his dignity and entailed particularly acute hardship, causing suffering beyond that inevitably associated with a prison sentence and the illnesses he suffered from, which amounted to inhuman and degrading treatment in violation of Article 3.

260 Mouisel v France, no. 67263/01, 14 November 2002; ECHR 2002-IX, (2002) ECHR 740.
261 McGlinchey and Others v the United Kingdom, no. 50390/99, 29 April 2003.
262 Holomiov v the Republic of Moldova, no. 30649/05, 7 November 2006.
263 Testa v Croatia, no. 20877/04, 12 July 2007.
264 Aleksanyan v Russia, no. 46468/06, 22 December 2008.

In ***Paladi v. Moldova (2009)***,[265] the court found a violation of Article 3 on account of the lack of proper medical assistance and the abrupt interruption of neurological treatment that was being administered to a remand detainee.

The case of **Martzaklis and Others v. Greece (2015)**[266] concerned the conditions of detention of HIV-positive persons in the psychiatric wing of Korydallos Prison Hospital. The applicants complained of their 'ghettoisation' in a separate wing of the hospital, and the authorities' failure to consider whether those conditions were compatible with their state of health. The court held that there had been a violation of Article 3 The physical conditions and sanitation facilities for persons detained in the prison hospital were inadequate.

See also:

- ***Hummatov v. Azerbaijan (2007)***[267] (violation on account of inadequate medical care in prison for tuberculosis, causing considerable mental suffering);

- **Kotsaftis v. Greece (2008)**[268] (applicant suffering from cirrhosis of the liver caused by chronic hepatitis B; failure to safeguard the applicant's physical integrity, in particular by providing him with the appropriate medical care; the court deplored the fact that the applicant, who was suffering from a serious and highly infectious disease, had been detained along with ten other prisoners in a cell measuring 24 square metres);

- **Poghosyan v. Georgia (2009)**[269] (breach; applicant had not received treatment for his viral hepatitis C; to protect the prisoner's health it was essential to provide treatment corresponding to the diagnosis, as well as proper medical supervision);

- ***VD v Romania (2010)***[270] (violation; prisoner had virtually no teeth and required dentures which he could not afford; not provided despite new legislation enacted in January 2007 making them available free of charge);

- ***Slyusarev v. Russia (2010)***[271] (violation; confiscation of the applicant's glasses for five months could not be explained in terms of the 'practical demands of imprisonment' and had been unlawful in domestic terms; unacceptable delay in providing new glasses);

- ***Ashot Harutyunyan v. Armenia (2010)***[272] (violation; applicant suffered from an acute bleeding duodenal ulcer, diabetes and a heart condition; clearly in need of regular medical care and supervision, which was denied to him over a prolonged period; no medical record to prove that the surgery recommended by his doctors had ever been carried out, or of him receiving any check-up or assistance from the detention facility's medical staff; considerable anxiety and distress caused, beyond the unavoidable level of suffering inherent in detention);

- ***Xiros v. Greece (2010)***[273] (violation; deteriorating vision despite a number of eye operations; stay of sentence so that he could undergo hospital treatment in a specialist eye clinic refused

265 Paladi v Moldova, no. 39806/05, 10 March 2009.
266 Martzaklis and Others v Greece, no. 20378/13, 9 July 2015.
267 Hummatov v Azerbaijan, nos. 9852/03 and 13413/04, 29 November 2007.
268 Kotsaftis v Greece, no. 39780/06, 12 June 2008.
269 Poghosyan v Georgia, no. 9870/07, 24 February 2009.
270 VD v Romania, no. 7078/02, 16 February 2010.
271 Slyusarev v Russia, no. 60333/00, 20 April 2010.
272 Ashot Harutyunyan v Armenia, no. 34334/04, 15 June 2010.
273 Xiros v Greece (2010), no. 1033/07, 9 September 2010.

by the domestic court despite being recommended by three of the four specialists who examined him; medical care likely to be provided in prison fell some way short of what would be available in hospital);

- ***Vasyukov v. Russia (2011)*** (delay in correctly diagnosing a detainee's tuberculosis amounted to inhuman and degrading treatment within the meaning of Article 3);

- ***Vladimir Vasilyev v. Russia (2012)***[274] (violation; longstanding failure to provide appropriate orthopaedic footwear to life prisoner who had had a toe of his right foot and the distal part of his left foot amputated due to frostbite);

- ***Iacov Stanciu v. Romania (2012)***[275] (violation; applicant developed a number of chronic and serious diseases in the course of his detention, including numerous dental problems, chronic migraine and neuralgia; failure to keep a comprehensive record of his health condition or the treatment prescribed and followed; therefore, no regular and systematic supervision of his state of health had been possible; no comprehensive therapeutic strategy to cure his diseases or to prevent their aggravation, with the result that his health had seriously deteriorated over the years);

- ***Gülay Çetin v. Turkey (2013)***[276] (violation; applicant remanded in custody and then imprisoned following conviction for murder; suffering from advanced cancer and died of her illness in hospital prison ward; held that the conditions of her detention, both before and after conviction, amounted to inhuman and degrading treatment);

- ***Nogin v. Russia (2015)***[277] (violation; applicant suffered from an insulin-dependent form of diabetes; failure to provide appropriate medical treatment);

- ***Mozer v. the Republic of Moldova and Russia (2016)***[278] (violation; the applicant suffered from bronchial asthma, respiratory deficiency and other conditions; although the doctors had considered the applicant's condition to be deteriorating and the prison medical facilities were inadequate, the authorities not only refused to transfer him to a civilian hospital for treatment but also exposed him to further suffering and a more serious risk to his health by transferring him to an ordinary prison);

- ***Kolesnikovich v. Russia (2016)***[279] (violation; the applicant had an ulcer as well as brain and spinal injuries; left without any medical supervision during the first two years of his detention, until his health had worsened to the extent that he could no longer take part in court hearings; his delayed admission to the prison hospital, combined with the failure to provide him with some of the required medication in order to at least relieve his severe stomach pain, had also been a serious shortcoming);

- ***Yunusova and Yunusov v. Azerbaijan (2016)***[280] (violation; the applicants were human rights defenders who both had several serious medical problems prior to arrest; government had failed to submit medical evidence to back up its claim that the couple's health had been stable and had not required a transfer to a medical facility);

274 Vladimir Vasilyev v Russia, no. 28370/05, 10 January 2012.
275 Iacov Stanciu v Romania, no. 35972/05, 24 July 2012.
276 Gülay Çetin v Turkey, no. 44084/10, 5 March 2013.
277 Nogin v Russia, no. 58530/08, 15 January 2015.
278 Mozer v the Republic of Moldova and Russia [GC], no. 11138/10, 23 February 2016.
279 Kolesnikovich v Russia, no. 44694/13, 22 March 2016.
280 Yunusova and Yunusov v Azerbaijan, no. 59620/14, 2 June 2016.

- ***Kondrulin v. Russia (2016)***[281] (violation; applicant died from cancer while serving his sentence; failure to provide the applicant with the medical care he had needed).

*Cases where no violation was established*

No violation of Article 3 was established in ***Sakkopoulos v. Greece (2004)***.[282] The applicant suffered from cardiac insufficiency and diabetes, and he submitted that his state of health was incompatible with his continued detention. On the evidence, it did not appear that the deterioration in his health was attributable to the prison authorities. Furthermore, the Greek authorities had provided appropriate medical care.

The applicant in ***Shchebetov v. Russia (2012)***[283] was serving a sentence of nine years' imprisonment for aggravated robbery. He complained that he had been infected with HIV and tuberculosis in detention. The court noted that the materials in the case file did not provide a sufficient evidential basis to find 'beyond reasonable doubt' that the Russian authorities were responsible for the applicant's contraction of the HIV infection. Moreover, the evidence available showed that the authorities had utilised all the means at their disposal in the light of the correct diagnosis of the applicant's condition, prescribing appropriate prophylactic treatment and admitting the applicant to medical institutions for in-depth examinations. No violation.

***Cătălin Eugen Micu v Romania (2016)***[284] (no violation; authorities had provided adequate medical treatment for prisoner's hepatitis C).

**Medical care in prison for persons suffering from mental illness**

Like prisoners with physical disabilities, detainees suffering from mental illness may require special medical care and treatment if their deprivation of liberty is to be compatible with Article 3.

In ***Aerts v Belgium (1998)***,[285] the applicant was arrested in November 1992 for an assault, having attacked his ex-wife with a hammer. He was placed in detention pending trial in the psychiatric wing of a prison. The applicant complained about the conditions of detention. It was accepted that the general conditions in the wing were unsatisfactory. The European Committee for the Prevention of Torture (CPT) had considered that the standard of care given to patients there fell below the minimum acceptable from an ethical and humanitarian point of view. It also considered that prolonging their detention there for lengthy periods carried an undeniable risk of a deterioration of their mental health. In the present case, however, there was no proof of a deterioration in Mr Aerts's mental health, and the living conditions on the psychiatric wing did not seem to have had such serious effects on his mental health as would bring them within the scope of Article 3. It had not been conclusively established that the applicant had suffered treatment that could be classified as inhuman or degrading. There had been no violation of Article 3.

In ***Romanov v Russia (2005)***,[286] the applicant, who suffered from a 'profound dissociative psychopathy', complained about the conditions and length of his detention in the psychiatric ward of a detention facility, where he had been held for over 15 months. The court held that there had been

281 Kondrulin v Russia, no. 12987/15, 20 September 2016.
282 Sakkopoulos v Greece, no. 61828/00, 15 January 2004.
283 Shchebetov v Russia, no. 21731/02, 10 April 2012.
284 Cătălin Eugen Micu v Romania, no. 55104/13, 5 January 2016.
285 Aerts v Belgium, no. 25357/94, 30 July 1998; Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.
286 Romanov v Russia, no. 63993/00, 20 October 2005.

a violation of Article 3. The conditions of detention, in particular the severe overcrowding and its detrimental effect on his well-being, combined with the length of the period during which he had been detained in such conditions, amounted to degrading treatment. They must have undermined his human dignity and aroused in him feelings of humiliation and debasement.

The applicant in ***Khudobin v Russia (2006)***[287] had a history of chronic illnesses which included epilepsy, pancreatitis, hepatitis and 'mental deficiencies'. Doctors had recommended out-patient psychiatric supervision. Although Russian law prohibited any form of entrapment or incitement by police officers, he was arrested for supplying heroin to an undercover police agent and held in custody until the criminal proceedings were discontinued 13 months later. During his trial he underwent three psychiatric examinations which ultimately concluded that he was legally insane at the time of the alleged crime, as a result of which he was discharged from criminal liability. Mr Khudobin complained that he did not receive adequate medical assistance at the relevant detention facility and was subjected to inhuman and degrading treatment. He said that his health sharply deteriorated in detention, where he contracted measles, bronchitis, and repetitive pneumonias and had several epileptic seizures. The court found that the Russian government had violated Article 3 by failing to providing him with adequate medical treatment and subjecting him to inhuman conditions of detention. It accepted the applicant's description of the facts because the government could not refute them, even though the events occurred presumably with the knowledge of the prison authorities. The level of anxiety caused by the lack of medical assistance, compounded by his HIV-positive status, serious mental disorders and physical sufferings, violated Article 3.

In ***Novak v Croatia (2007)***,[288] the applicant complained about a lack of adequate medical treatment for his post-traumatic stress disorder. The court found that the applicant had not provided any documentation to prove that his detention conditions had led to a deterioration of his mental health and dismissed the application.

The applicant in ***Kucheruk v Ukraine (2007)***[289] was suffering from chronic schizophrenia. He complained of ill-treatment while in detention, notably handcuffing in solitary confinement, and of inadequate conditions of detention and medical care. The court held that there had been a violation of Article 3. The handcuffing for seven days of the applicant who was mentally ill without psychiatric justification or medical treatment had to be regarded as inhuman and degrading treatment. Furthermore, his solitary confinement and handcuffing suggested that the authorities had not provided appropriate medical treatment and assistance to him.

The applicant in ***Dybeku v. Albania (2007)***,[290] was suffering from chronic paranoid schizophrenia for which he had treated in psychiatric hospitals for a number of years. Having been sentenced in 2003 to life imprisonment for murder and illegal possession of explosives, he was placed in a normal prison, where he shared cells with inmates who were in good health and where he was treated as an ordinary prisoner. The court held that there had been a violation of Article 3. The fact that the Albanian Government admitted that the applicant had been treated like the other prisoners, notwithstanding his long history of paranoid schizophrenia, showed a failure to comply with the Council of Europe's recommendations on dealing with prisoners with mental illnesses. Under Article 46 (binding force and execution of judgments), the court invited Albania as a matter of urgency to take the necessary measures to secure appropriate conditions of detention, and in particular adequate medical treatment, for prisoners requiring special care on account of their state of health.

287 Khudobin v Russia 59696/00, 26 October 2006, [2006] ECHR 898.
288 Novak v Croatia, no. 8883/04, 14 June 2007.
289 Kucheruk v Ukraine, no. 2570/04, 6 September 2007.
290 Dybeku v Albania, no. 41153/06, 18 December 2007.

In ***Sławomir Musiał v Poland (2009)***,[291] the applicant, who suffered from epilepsy, schizophrenia and other mental disorders, was detained in various remand centres without psychiatric facilities. The court found that the generally poor conditions in which he was held were not appropriate for ordinary prisoners, let alone for someone with a history of mental disorder and in need of specialised treatment, who was more susceptible to a feeling of inferiority and powerlessness. The applicant had been kept in detention centres primarily for healthy people for nearly 3½ years of detention. Doctors had recommended that he receive regular psychiatric supervision but even after his attempted suicide he was not given in-patient care. The authorities' failure during most of the applicant's time in detention to hold him in a suitable psychiatric hospital or a detention facility with a specialised psychiatric ward had unnecessarily exposed him to a risk to his health which must have resulted in stress and anxiety. It also ignored the Council of Europe Committee of Ministers recommendations in respect of prisoners suffering from serious mental-health problems.[292]

Owing to its nature, duration and severity, the treatment to which Mr Musial was subjected qualified as inhuman and degrading, in violation of Article 3. Poland was to secure his transfer to a specialised institution at the earliest possible date which was capable of providing him with the necessary psychiatric treatment and constant medical supervision. Furthermore, in view of the seriousness and structural nature of the problem of overcrowding, and the resultant inadequate living and sanitary conditions in Polish detention facilities, Article 46 would be invoked. Necessary legislative and administrative measures were to be taken rapidly in order to secure appropriate conditions of detention, in particular for prisoners in need of special care because of their state of health.

In ***Kaprykowski v Poland (2009)***,[293] the applicant was suffering from epilepsy marked by frequent (daily) seizures and also from encephalopathy accompanied by dementia. He was classified by social security authorities as a person with a 'first-degree disability making him completely unfit to work'. He alleged that the medical treatment and assistance offered to him during his detention in a remand centre had been inadequate in view of his severe epilepsy and other neurological disorders. The court found that throughout his incarceration several doctors had stressed that he should receive specialised psychiatric and neurological treatment and be under constant medical supervision. Furthermore, the medical experts appointed by the district court considered that the penitentiary system could no longer offer him the treatment he required and recommended that he undergo brain surgery. Consistent with this, when he was being released from the prison hospital, the doctors clearly recommended that he be placed under 24-hour medical supervision. Given the evidence, the court was convinced that Mr Kaprykowski had been in need of constant medical supervision during his time in the remand centre, in the absence of which he faced major health risks. The lack of adequate medical treatment there, and placing him in a position of dependency and inferiority vis-à-vis his healthy cellmates, undermined his dignity and entailed particularly acute hardship. This caused him anxiety and suffering beyond that inevitably associated with any deprivation of liberty. His continued detention without adequate medical treatment and assistance constituted inhuman and degrading treatment, and violated Article 3.

In ***Raffray Taddei v France (2010)***,[294] the applicant suffered from a number of medical conditions, including anorexia and Munchausen's syndrome. She complained about her continuing detention and a failure to provide her with appropriate treatment. In April 2009 a psychiatric expert stated that she required specialised supervision for the treatment of the above conditions. The need for such

291 Sławomir Musiał v Poland, no. 28300/06, 20 January 2009.

292 Recommendation R (98) 7 of the Committee of Ministers of the Council of Europe to the Member States concerning the ethical and organisational aspects of health care in prison, and Recommendation Rec (2006) 2 of 11 January 2006 on the European Prison Rules.

293 Kaprykowski v Poland, no. 23052/05, 3 February 2009, [2009] ECHR 198.

294 Raffray Taddei v France, no. 36435/07, 21 December 2010.

treatment was confirmed by a psychiatrist assigned to her. The court found that the failure by the national authorities to sufficiently take into account her need for specialised care in an adapted facility, combined with transfers to prison institutions which appeared not to have the facilities necessary for the proper treatment of her illness, had been capable of causing her a level of distress that exceeded the unavoidable level of suffering inherent in detention. Violation of Article 3.

In ***Cocaign v France (2011)***,[295] the applicant was imprisoned in 2006 for attempted rape committed using a weapon. In January 2007 he killed a fellow-inmate before cutting open his chest and eating part of his lungs. On 17 January 2007, he was condemned to 45 days in a disciplinary cell for this violence' to his deceased cellmate. On 18 January 2007, the prison governor applied to the prefect of the département of Yvelines to have him compulsorily admitted to a psychiatric institution. The prefect acceded to the request, ordering his admission to the Villejuif difficult patients' unit. On 14 February 2007, a hospital doctor concluded that the applicant's condition no longer justified his involuntary placement. The prefect ordered his return to Bois d'Arcy, where he finished serving his disciplinary penalty. On 26 October 2007, a court report by two psychiatrists established that the applicant was legally insane at the time of the murder.

The court noted that the day after the disciplinary penalty had been imposed, the prison Governor had applied for the applicant's compulsory admission to a psychiatric hospital, and an order to that effect had been made four days later. The applicant had spent three weeks in the hospital and the decision to return him to a punishment cell had been taken only after he had been given appropriate treatment. The rest of the disciplinary penalty had been served under medical supervision. It could not be inferred from the applicant's illness alone that his confinement in a punishment cell and the execution of that penalty constituted inhuman and degrading treatment and punishment in breach of Article 3.

In ***G v France (2012)***,[296] the applicant was suffering from a chronic schizophrenia-type illness with evidence of psychosis, hallucinations, delusions and aggressive and addictive behaviour. He was alternately kept in prison and hospital psychiatric wards between 1996 and 2004. On 21 May 2005, he was sent to Toulon-La Farlède prison after causing damage in Chalucet psychiatric hospital, where he had asked to be admitted. As a result, on 30 June 2005 he was sentenced to 12 months imprisonment, of which ten months were suspended. On his arrival in prison he set fire to his mattress. He was placed under psychiatric observation, then made to share a cell with another detainee, who was known to have psychiatric problems. On 16 August 2005 a fire broke out in his cell. Both detainees suffered serious injuries. With burns to 65% of his body, the applicant's cell mate died from his injuries on 6 December the same year. The applicant said that he 'suffered from schizophrenia, heard voices and saw strange things' but that 'everything was better at the moment'; he added that 'I feel freer since the fire in my cell ... everything has become clearer in my head. I can say that everything is calm now'. On 13 November 2008 the Var Assize Court sentenced the applicant to 10 years imprisonment and declared him civilly liable 'for the prejudice suffered by the civil parties'.

Pursuant to Article 3, the applicant argued that his constant moves back and forth between prison and hospital amounted to inhuman and degrading treatment. He explained that when his condition deteriorated to the point where it was no longer compatible with detention he was placed in hospital, and when he recovered his 'stability' he was sent back to prison until his condition deteriorated again. He considered that his return to prison constituted a form of torture. Lastly, he argued that the decision to put him back in normal detention at Les Baumettes was absurd considering his extreme vulnerability vis-à-vis the other detainees and the danger to his safety.

295 Cocaign v France, no. 32010/07, 3 November 2011.

296 G v France, no. 27244/09, 23 February 2012.

The court held that there had been a violation of Article 3. It referred to the Council of Europe Committee of Ministers' Recommendation Rec (2006) on the European Prison Rules. The applicant's continued detention over a four-year period had made it more difficult to provide him with the medical treatment his condition required, and subjected him to hardship exceeding the unavoidable level of suffering inherent in detention. Alternately treating him in prison and a psychiatric institution, and detaining him in prison, clearly impeded the stabilisation of his condition, demonstrating thereby that he had been unfit to be detained from an Article 3 standpoint. The physical conditions of detention in the prison psychiatric unit, where the applicant had been held on several occasions, had been described by the domestic authorities themselves as demeaning and could only have exacerbated his feelings of distress, anxiety and fear.

In ***ZH v Hungary (2012)***,[297] ZH had a learning disability. He was also deaf and mute and unable to use sign language or to read or write. He complained that his detention in prison for almost three months constituted inhuman and degrading treatment. The court held that there had been a violation. Given the inevitable feelings of isolation and helplessness that flowed from his disabilities, and ZH's lack of comprehension of his situation and the prison order, he must have suffered anguish and a sense of inferiority, especially as a result of being cut off from the only person (his mother) with whom he could effectively communicate. Although the allegations of molestation by other inmates were not supported by evidence, a person in his position would have faced significant difficulties bringing any such incidents to the wardens' attention, which could have resulted in fear and the feeling of being exposed to abuse.

The applicant in ***Claes v Belgium (2013)***[298] was a man with an intellectual disability who committed a series of sexual assaults. He was held continuously in the psychiatric wing of a prison for many years. Apart from access to the prison psychiatrist or psychologist, no specific treatment or medical supervision was prescribed for him. The court held that there had been a violation of Article 3. The national authorities had not provided him with adequate care and he had been subjected to degrading treatment as a result. His continued detention over a lengthy period in the psychiatric wing without appropriate medical care or any realistic prospect of change constituted particularly acute hardship which caused him distress that went beyond the suffering inevitably associated with detention. Whatever obstacles were created by his own behaviour, they did not release the state from its obligations, given the position of inferiority and powerlessness typical of patients confined in psychiatric hospitals and even more so of those detained in a prison setting. The applicant's situation stemmed in reality from a structural problem: on the one hand the support provided to persons in prison psychiatric wings was inadequate, on the other placing them in facilities outside prison often proved impossible, either because of a shortage of suitable psychiatric hospital beds or because the relevant legislation did not allow mental health authorities to order their placement in external facilities.

In ***Ţicu v Romania (2013)***,[299] the applicant was serving a 20-year sentence for participating in an armed robbery occasioning the victim's death. In childhood he had suffered from an illness which led to considerable delays in his mental and physical development. He complained about the poor conditions of detention in the prisons where he had been serving his sentence, and especially overcrowding and shortcomings in the provision of medical treatment. The court noted that the recommendations of the Committee of Ministers of the Council of Europe to member States[300] advocated that prisoners suffering from serious mental health problems should be kept and cared for in a hospital facility that

297 ZH v Hungary, no. 28973/11, 8 November 2012.

298 Claes v Belgium, no. 43418/09, 10 January 2013, [2013] ECHR 286.

299 Ţicu v Romania, no. 24575/10, 1 October 2013.

300 Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison and Recommendation Rec (2006) 2 on the European Prison Rules.

was adequately equipped and possessed appropriately trained staff. The living conditions in the institutions where the applicant had been held, and continued to be held, were a particular cause for concern. Such conditions would be inadequate for any person deprived of their liberty but especially so for someone like him on account of his mental health problems and need for appropriate medical supervision. There had been a breach of Article 3.

In ***Bamouhammad v Belgium (2015)***,[301] the applicant was suffering from Ganser syndrome (or 'prison psychosis'). He alleged that in prison he had been subjected to inhuman and degrading treatment which affected his mental health. He also complained of a lack of effective remedies. The court found that the level of seriousness required for treatment to be regarded as 'degrading' had been exceeded. The applicant's need for psychological supervision had been emphasised in all medical reports. However, endless transfers had prevented such supervision with the result that his already fragile mental health had not ceased to worsen throughout his detention. The prison authorities had not sufficiently considered his vulnerability or viewed his situation from a humanitarian perspective. There had been a violation of Article 3 (and of Article 13 — right to an effective remedy).

The case of ***Murray v the Netherlands (2016)***[302] concerned a man convicted of murder in 1980 who served his life sentence on the islands of Curaçao and Aruba until being granted a pardon in 2014 due to his deteriorating health. The applicant complained about the imposition of a life sentence without any realistic prospect of release and that he was not provided with a special detention regime for prisoners with psychiatric problems. The court found a violation of Article 3, reiterating that states are under an obligation to provide appropriate medical care to detainees suffering from mental health problems. Mr Murray had been assessed prior to being sentenced as requiring treatment. Subsequently, the domestic court which advised against his release found a close link between the persistence of his risk of reoffending and the lack of treatment. Notwithstanding this, he was never provided with any treatment for his mental condition during the time he was imprisoned, and consequently any request by him for a pardon was in practice incapable of leading to release.

The case of **Rooman v. Belgium (2019)[303]** concerned the question of the psychiatric treatment provided to a sex offender who had been in compulsory confinement since 2004 on account of the danger that he posed and the lawfulness of his detention. The applicant complained that he had not received the psychological and psychiatric treatment required by his mental-health condition. He also alleged that the lack of treatment was depriving him of the prospect of an improvement in his situation and that, as a result, his detention was unlawful.

The Grand Chamber held that from the beginning of 2004 until August 2017 there had been a violation of Article 3, and that from August 2017 onwards there had been no violation of Article 3. It found that the national authorities had failed to provide treatment for the applicant's health condition from the beginning of 2004 to August 2017. His continued detention without a realistic hope of change and without appropriate medical support for a period of about thirteen years had amounted to particularly acute hardship, causing him distress of an intensity exceeding the unavoidable level of suffering inherent in detention. The Grand Chamber also held that from the beginning of 2004 until August 2017 there had been a violation of Article 5. In that regard, the court decided to refine its case-law principles, and to clarify the meaning of the obligation on the authorities to provide treatment to persons placed in compulsory confinement. The court held that the applicant's deprivation of liberty between 2004 and August 2017 had not taken place in an appropriate institution that was capable of providing him with treatment adapted to his condition, as required by Article 5§1. However, the relevant authorities had drawn the necessary conclusions from the Chamber judgment of 18 July 2017,

301 Bamouhammad v Belgium, no. 47687/13, 17 November 2015.
302 Murray v the Netherlands [GC], no. 10511/10, 26 April 2016.
303 Rooman v. Belgium [GC], no. 18052/11, 31 January 2019.

and had put in place a comprehensive treatment package, leading the court to conclude that there had been no violation of this provision in respect of the period since August 2017.

The case of **WD v Belgium (2016)**[304] concerned the confinement for over 15 years of a mentally-ill man in the psychiatric wing of an ordinary prison without appropriate medical care. Previously, WD had been found not to be criminally responsible for the sex offences with which he was charged. The applicant complained that the institution in which he was held was ill-adapted to the situation of people with mental-health problems. The court found that WD was subjected to degrading treatment by being detained in a prison environment for so long without appropriate treatment and with no prospect of reintegrating into society. This had caused him particularly acute hardship and an intensity of distress which exceeded the unavoidable level of suffering inherent in detention. The court considered that his situation originated in a structural deficiency specific to the Belgian psychiatric detention system. Pursuant to Article 46, the court required the state to reorganise its system for the psychiatric detention of offenders in such a way that the detainees' dignity was respected. In particular, it encouraged the Belgian state to take action to reduce the number of offenders with mental disorders who were detained in prison psychiatric wings without appropriate treatment. The court applied the pilot-judgment procedure to the case, giving the government two years to remedy the general situation and adjourning proceedings in all similar cases for that period.[305]

**Prisoners with suicidal tendencies**

The applicant in **Kudla v Poland (2000)**[306] suffered from chronic depression and twice tried to commit suicide. He complained that he was not given adequate psychiatric treatment in detention.

The court found no violation of Article 3. His suicide attempts could not be linked to any discernible shortcoming on the part of the authorities. Furthermore, he had been examined by specialist doctors and frequently received psychiatric assistance. It reiterated that the state must ensure that a detainee's health and well-being are adequately secured by providing them with the requisite medical assistance.

In **Keenan v United Kingdom (2001)**,[307] Mark Keenan had been receiving intermittent anti-psychotic medication for several years and his medical history included symptoms of paranoia, aggression, violence and deliberate self-harm. His mother alleged that he had suffered inhuman and degrading treatment due to the conditions of detention. The court found no violation of Article 2 (see above) but did find that there was a violation of Article 3. The lack of effective monitoring of his condition, and the lack of informed psychiatric input into his assessment and treatment, disclosed significant defects in the medical care provided to a mentally-ill person known to be a suicide risk. The belated imposition on him in those circumstances of a serious disciplinary punishment, which may well have threatened his physical and moral resistance, was incompatible with the standard of treatment required in respect of a mentally-ill person.

304 WD v Belgium, no. 73548/13, 6 September 2016.

305 The court also found that there had been a violation of Article 5§1. The applicant's detention since 2006 in a facility ill-suited to his condition had broken the link required by Article 5§1(e) between the purpose and the practical conditions of detention. There had also been a violation of Articles 5§4 and 13. The Belgian system in operation at the time had not provided the applicant with an effective remedy in practice in respect of his Convention complaints – in other words, a remedy capable of affording redress for the situation of which he was the victim and preventing the continuation of the alleged violations.

306 Kudla v Poland [GC], no. 30210/96, 26 October 2000.

307 Keenan v United Kingdom, no. 27229/95, 3 April 2001, [2001] ECHR 242.

In **Rivière v France (2006)**,[308] the applicant complained about his continued imprisonment in spite of his psychiatric problems. He had been diagnosed with a psychiatric disorder involving suicidal tendencies. The experts in his case had been concerned by aspects of his behaviour, in particular a compulsion towards self-strangulation, which indicated a need for treatment outside the prison. The court held that the applicant's continued detention without appropriate medical supervision amounted to inhuman and degrading treatment. It observed that prisoners with serious mental disorders and suicidal tendencies require special measures geared to their condition regardless of the seriousness of their offence.

The case of **Renolde v France (2008)**[309] concerned the placement in a disciplinary cell for 45 days and suicide of the applicant's brother who was suffering from acute psychotic disorders capable of resulting in self-harm.

The court found that there had been a violation of Article 2 (see above). The court further held that there had been a violation of Article 3 because of the severity of the disciplinary punishment imposed on him, which was liable to break his physical and moral resistance. He had been suffering from anguish and distress at the time. Indeed, only eight days before his death his condition had so concerned his lawyer that she had immediately asked the investigating judge to order a psychiatric assessment of his fitness for detention in a punishment cell. The disciplinary penalty imposed on him was incompatible with the standard of treatment required in respect of a mentally ill person and constituted inhuman and degrading treatment and punishment.

In **Güveç v Turkey (2009)**,[310] the applicant, aged 15 at the time, had been tried before an adult court and found guilty of membership of an illegal organisation. He was held for more than 4½ years in pre-trial detention in an adult prison, where he did not receive medical care for his psychological problems and made repeated suicide attempts.

The court held that there had been a violation of Article 3: in the light of his age, the length of his detention with adults and the authorities' failure to provide adequate medical care, or to take steps to prevent his repeated suicide attempts, he had been subjected to inhuman and degrading treatment.

The case of **Ketreb v France (2012)**[311] concerned the suicide in prison by hanging of a drug addict. His sisters alleged that the French authorities failed to take proper steps to protect their brother's life when he was placed in the prison's disciplinary cell. They also complained that the disciplinary measure applied to their brother was unsuitable for a person in his state of mind. The court held that there was a violation of Article 2, finding that the authorities had failed in their positive obligation to protect his right to life (see above). There had also been a violation of Article 3: his placement in a disciplinary cell for two weeks was incompatible with the level of treatment required in respect of such a mentally disturbed person.

**Requiring a prisoner to take medication**

The applicant in the case of ***Gennadiy Naumenko v Ukraine (2004)***[312] was sentenced to death in 1996. In June 2000 the sentence was commuted to one of life imprisonment. He alleged that during his time in prison from 1996 to 2001 he had been subjected to inhuman and degrading treatment, in that he

308 Rivière v France, no. 33834/03, 11 July 2006.
309 Renolde v France, no. 5608/05, 16 October 2008, [2008] ECHR 1085.
310 Güveç v Turkey, no. 70337/01, 20 January 2009.
311 Ketreb v France, no. 38447/09, 19 July 2012.
312 Gennadiy Naumenko v Ukraine, no. 42023/98, 10 February 2004.

had been wrongfully forced to take medication. The court held that there had been no violation of Article 3. No matter how disagreeable, therapeutic treatment could not in principle be regarded as contravening Article 3 if it was persuasively shown to be necessary. From the evidence of the witnesses, the medical file and the applicant's own statements, it was clear that the applicant was suffering from serious mental disorders and had twice made attempts on his own life. He had been put on medication to relieve his symptoms. Furthermore, the applicant had not produced sufficient detailed and credible evidence to show that, even without his consent, the authorities had acted wrongfully in making him take the medication. The court did not have sufficient evidence before it to establish beyond reasonable doubt that the applicant had been forced to take medication in a way that contravened Article 3 of the Convention.

**Delays in transfer to hospital**

Some lapse of time when assessing the appropriate custodial clinic to which an offender should be transferred is acceptable. However, 15 months did not stroke a reasonable balance: Morsink v Netherlands 11 May 2004 at 66-70. Nelissen v Netherlands 5 April 2011 at 60 where the period was one year and one month. Eight months delay in transferring a defendant who had been found to lack criminal responsibility due to a delusional disorder, from an ordinary detention centre to a specialised hospital was too long: CB v Romania 4 April 2010 at 49-59. Conversely, where the prisoner is clearly a dangerous risk with detention falling within Article 5 para 1(a), and the expert medical opinion is that he is not yet ready to benefit from specialised treatment, the failure to transfer him from detention in prison to a hospital will not offend: De Schepper v Belgium 13 October 2009 at 47-50. Failure to transfer a dangerously disturbed person to a suitable therapeutic regime due to alack of places did disclose a violation; nor could the violent conduct of the person be a ground justifying continued long-term detention in an unsuitable setting: De Claes v Belgium 10 January 2013 at 117-121. See also Glien v Germany.

**ECHR ARTICLE 5 (RELATIONSHIP WITH GROUND OF DETENTION)**

As to the applicability of Article 5, the case of **Aerts v Belgium (1998)**[313] is relevant. There, the court reiterated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the detention of a person as a mental health patient will only be lawful for the purposes of Article 5(1)(e) if effected in a hospital, clinic or other appropriate institution. By analogy, there are criminal cases where the ground given for a remanding a person in custody in the course of criminal proceedings is not a risk of further offending or absconding but the person's own protection. This will usually occur where on a first appearance in court the defendant is psychotic and unable to care for themselves if released. In substance, the individual is being detained on the ground of unsoundness of mind rather than on the usual 'criminal' refusal of bail grounds of risk of further offending or of absconding. That being so, it may be argued that a prolonged period of detention in prison pending transfer to a hospital or place of detention properly related to the ground relied upon also offends the Article 5 principle set down in *Aerts*.

This line of argument is consistent with ***LB v Belgium (2012)***,[314] which concerned a serving prisoner. LB was almost continuous detained from 2004 until 2011 in the psychiatric wings of two prisons, despite the authorities' insistence on the need for placement in a structure adapted to his pathology. The applicant complained that the institution in which he was held was ill-adapted to the situation of people with mental-health problems.

313 Aerts v Belgium, no. 25357/94, 30 July 1998, Reports 1998-V, (1998) 29 EHRR 50, [1998] ECHR 64.
314 LB v Belgium, no. 22831/08, 2 October 2012.

The Court held that there had been a violation of Article 5§1. The applicant had been detained in a prison institution for seven years when all the medical and psychiatric or social workers' opinions and competent authorities agreed that it was ill-adapted to his condition. The conditions of the detention had been incompatible with its purpose. Detention and treatment on a psychiatric wing was supposed to be temporary while the authorities looked for an institution that was better adapted to the applicant's condition. The place of detention was inappropriate, and the applicant's therapeutic care was very limited in the prison.

**Prison disciplinary measures and Article 5**

Disciplinary steps imposed within a prison which have effects on the conditions of a person's detention cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention, and they fall outside the scope of Article 5. See e.g. ***Bollan v United Kingdom (2000)***[315] and ***Munjaz v United (2012)***,[316] where the applicant's seclusion in a high-security hospital did not amount to a further deprivation of liberty.

**ARTICLE 8 AND PRISONER-DOCTOR CORRESPONDENCE**

The Court dealt for the first time with the monitoring of a prisoner's medical correspondence in the case of ***Szuluk v United Kingdom (2009)***.[317] The case concerned the monitoring by the prison medical officer of the prisoner's correspondence with the specialist supervising his treatment in hospital, which related to a life-threatening medical condition. The court accepted that a prisoner with a life-threatening medical condition would want to be reassured by an outside specialist that he was receiving adequate medical treatment in prison. Taking into account the circumstances of the case, the court found that, although the monitoring of the prisoner's medical correspondence had been limited to the prison medical officer, it had not struck a fair balance with his right to respect for his correspondence (§§ 49-53).

315 Bollan v United Kingdom, no. 42117/98, 4 May 2000 (dec.).

316 Munjaz v United Kingdom, 2913/06, 17 July 2012.

317 Szuluk v United Kingdom, no. 36936/05, 2 June 2009.