



# ECHR and Mental Health

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# §1 — Introduction

# Relevant Articles

5

## **Deprivation of Liberty: Right to liberty and security of person**

Provides that no one may be detained on the ground of unsoundness of mind unless it is lawful and in accordance with a procedure prescribed by law.

In relation to crime, also permits lawful arrest and detention following conviction.

2

## **Everyone's right to life shall be protected by law**

Much of the case law concerns incidents of suicide in prisons. However, Article 2 also covers grossly inadequate hospital conditions and requires an effective independent investigation of alleged breaches of the state's duty to protect life.

3

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

This article is relevant to the conditions of detention in prisons, police stations, hospitals and social care homes.

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## **Determination of civil rights and criminal charges**

All are entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. See tomorrow's presentation by Sara Iglesias Sanchez.

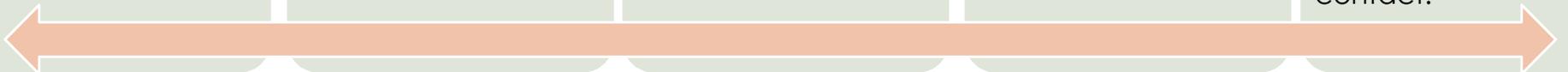
Includes proceedings to divest individuals of their legal capacity.

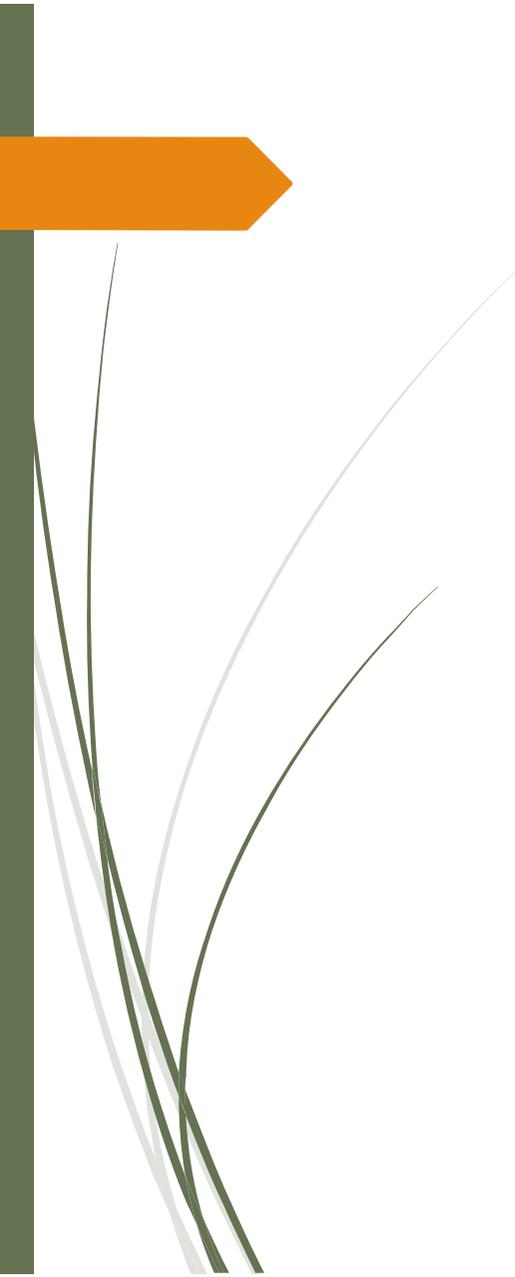
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## **Respect for private and family life, home and correspondence**

The aim is to protect the citizen against arbitrary interference.

Concerns matters such as free and informed consent to medical treatment, confidentiality of patients, patient care, guardianship, family contact, correspondence of patients, patient care proceedings, family contact.





## §2 — Article 5

Deprivation of Liberty:  
Right to liberty and security of person



# Structure of Article 5

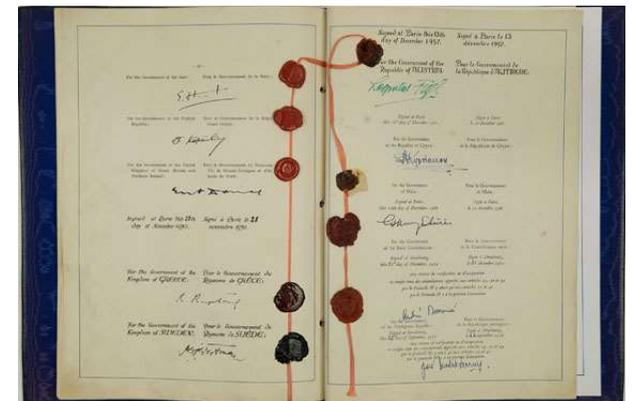
- ▶ As far as deprivation of liberty on mental health grounds is concerned, Article 5 contains three key paragraphs. To comply with the Convention:

Article 5(1)	Any deprivation of liberty must be:  (a) Lawful; and (b) In accordance with a procedure prescribed by law  The aim is to protect the citizen from arbitrary detention.
Article 5(2)	The person must be told the reasons for their detention (so that they can decide whether to take proceedings under Article 5(4))
Article 5(4)	The person 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'

# Article 5(1)

§5–(1) 'No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

(e) the lawful detention of ... persons of unsound mind'



**Note that** Article 5 is only concerned with whether a person is detained lawfully and in accordance with a procedure prescribed by law. Provided the person is detained in a hospital or facility appropriate for persons of unsound mind, it is not concerned with the conditions of detention or the level of detention/security: *Ashingdane v United Kingdom (1985)*.

# Article 5 concerned only with deprivations of liberty

**Note also** that Article 5(1) is concerned only with deprivations of liberty and not with restrictions of liberty or movement which do not amount to a deprivation of liberty, which are governed by Article 2 of Protocol 4. One must therefore ask two questions:

- ▶ **1 Is this person deprived of their liberty?** If not, Article 5 and its safeguards do not apply.
- ▶ **2 If s/he is, is the deprivation of liberty both lawful and in accordance with a procedure prescribed by law?** In other words, does it comply with the requirements of Article 5.

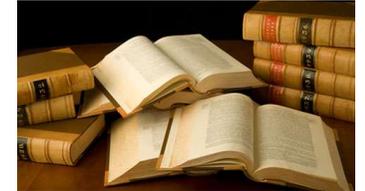




# Question 1: Is there a deprivation of liberty?

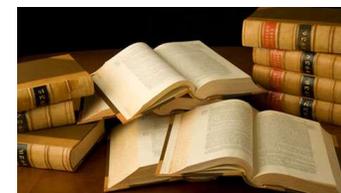
1. Deprivation of liberty requires that the person has been confined in a particular restricted space 'for a not negligible length of time. This is the 'objective condition'.
2. In addition, a 'subjective condition' must be met. This is that the person has not validly consented to their confinement.
3. A person cannot consent to being confined if they lack capacity to consent to it.
4. The distinction between deprivation of liberty and restriction of liberty is one of degree or intensity, not one of nature or substance.
5. The starting-point is the specific situation of the individual concerned. Account must be taken of a whole range of factors arising in the particular case, such as the type, duration, effects and manner of implementation of the measure in question.
6. Of considerable importance is whether the professionals exercise 'complete and effective control' over the person's his care and movements, so that the individual is 'under continuous supervision and control and is not free to leave.'

## Case law examples: No deprivation of liberty



<b>Nielsen v Denmark (1988)</b>	<p>Jon Nielsen was 12 years old. He was admitted to the State Hospital's Child Psychiatric Ward at the request of his mother who held sole parental rights.</p> <p>Held that he was not deprived of his liberty. He was not detained as 'a person of unsound mind'. His treatment 'consisted of regular talks and environmental therapy', not medication. The ward was not used for compulsory admissions or to treat patients with a psychosis. The restrictions on his freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital.</p>
<b>HM v Switzerland (2002)</b>	<p>HM suffered from 'senile dementia' She was placed in a nursing home on account of neglect.</p> <p>Held that HM was not deprived of her liberty. She was not placed in the secure ward of the nursing home. She enjoyed freedom of movement and was able to maintain social contact with the outside world. She had been undecided about where she wanted to live. She 'was hardly aware of the effects of her stay' and had stated that she had no reason to be unhappy with the nursing home. After moving there, she agreed to stay.</p>

# Case law examples: Deprivation of liberty (1)



## **HL v the United Kingdom (2004)**

HL was autistic and unable to speak. His level of understanding was limited. After harming himself, he was detained in a psychiatric hospital intensive behavioural unit as an 'informal patient', i.e. without any detention order being made under the Mental Health Act 1983. Contact between him and his long-term carers was initially prohibited and then restricted to one visit a week. He was sedated to ensure that he remained 'tractable' and kept under continuous observation. It was made clear that, if he tried to leave the hospital, staff would prevent him and arrange an assessment for his detention under the 1983 Act.

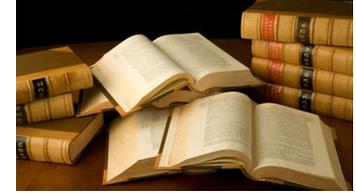
Held to be a deprivation of liberty. His carers wanted him to be released to their care. However, the health care professionals treating and managing HL exercised complete and effective control over his care and movements throughout the relevant period. Any suggestion to the contrary was a 'fairy tale'.

## **Storck v Germany (2005)**

At her father's request, Waltraud Storck was placed in the locked ward of a private psychiatric clinic from 29 July 1977 to 5 April 1979 following various family conflicts.

Held to be a deprivation of liberty. Ms Storck had been placed on a locked ward. She had been under the continuous supervision and control of clinic personnel and had not been free to leave during her entire stay of some 20 months. After attempting to flee, she was 'fettered' in order to secure her stay. When she once succeeded in escaping, she was brought back by police. She was not able to maintain regular social contacts with the outside world. Objectively, she must be considered to have been deprived of her liberty.

## Case law examples: Deprivation of liberty (2)



<b>Shtukaturov v Russia (2008)</b>	The applicant's admission to hospital was requested by his mother, as the guardian of a legally incapable person. Held to be a deprivation of liberty. He was in a locked facility. After attempting to flee in January 2006, he was tied to his bed and given an increased dose of sedative medication. He was not allowed to communicate with the outside world. As to the subjective condition, he had not agreed to his continued stay in the hospital
<b>Stanev v Bulgaria (2012)</b>	Without consulting or informing him, Mr Stanev's guardian had him placed in a social care home for men with psychiatric disorders, in a remote mountain location. Held to be a deprivation of liberty. He was under constant supervision and was not free to leave the home without permission. The time he spent away and the places he could go were always subject to controls and restrictions. When he did not return from leave in 2006, the home's management asked the police to return him. In terms of the subjective condition, the court 'was not convinced that he ever consented to the placement, even tacitly'.
<b>DD v Lithuania (2012)</b>	DD had a guardian. In 2004, without her consent she was placed in a social care home. The court found a deprivation. The 'key factor' was that the home's 'management had exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted ... to this day.' She was not free to leave without permission and on at least one occasion had been brought back by the police. The home's director had full control over who she could see and from whom she could receive telephone calls. On one occasion she was restrained, placed in a secure ward, given drugs and tied down for a period of 15 to 30 minutes.



## Question 2: Is the deprivation of liberty lawful and in accordance with a procedure prescribed by law?

The leading case is ***Winterwerp v Netherlands* (1979)**.

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):

- A. The deprivation of liberty must be lawful, i.e. in conformity with domestic law and the Convention.
- B. 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.
- C. The mental disorder must be of a kind or degree warranting compulsory confinement.
- D. The validity of continued confinement depends upon the persistence of such a disorder.

## A. Conformity with domestic law and the Convention (1)

- ▶ Lawfulness presupposes conformity with both domestic law and the Convention.
- ▶ As regards conformity with domestic law, 'lawful' covers procedural as well as substantive rules (see e.g. *Halilovic v Bosnia and Herzegovina* (2009)).
- ▶ As regards conformity with the Convention, the implied principles are the **rule of law** and, connected to it the principles of:
  - **legal certainty**
  - **proportionality**
  - **protection from arbitrariness**, which is the very aim of Article 5 (*Plesó v Hungary*, 2012).
- ▶ The law must be sufficiently clear and precise (**legal certainty**). The conditions for a deprivation of liberty under domestic law must be clearly defined and the law foreseeable in its application.
- ▶ The authorities should consider less intrusive measures than detention (**proportionality**).



## A. Conformity with domestic law and the Convention (2)

- ▶ 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;
  - the order and detention do not genuinely conform to the purpose of the restrictions permitted by the Article 5(1)(e)(e);
  - there is no connection between the ground relied on and the place and conditions of detention (see *Aerts v Belgium*, 1998);
  - there is no proportionality between the ground relied on and the detention in question.
  - The speed with which the domestic courts replace a detention order which has expired or has been found to be defective is defective.
  - There is an absence or lack of reasoning in detention orders (no reasons, 'too laconic').
  - There is no time-limit to the period of detention authorised by the order.



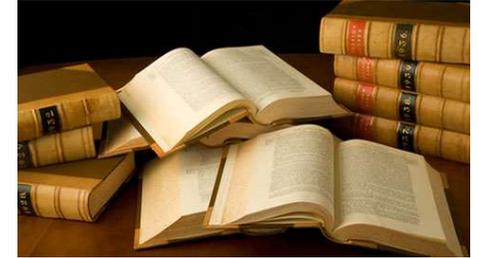
## B. Reliable evidence of unsoundness of mind — Objective medical evidence

*The second condition is that, 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 conforms with Article 5§1 (e) if it has been ordered without seeking the opinion of a medical expert.

A mental condition must be of a certain gravity in order to be considered as a 'true' mental disorder (*Ruiz Rivera v Switzerland, 2012*).

# Case law on second condition



- ▶ In ***X v United Kingdom (1981)***, a patient 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 a high-secure hospital without any doctor having certified first that he was of unsound mind. This argument was rejected. The *Winterwerp judgment* expressly identified “emergency cases” as constituting an exception to the principle.
- ▶ The applicant in ***Kay v United Kingdom (1994)*** also complained about his recall to the same high-secure hospital without a prior medical assessment, in his case on the expiration of a lengthy prison sentence. The court found that his recall was unlawful. In the absence of any emergency, there were no particular circumstances to justify the omission.
- ▶ In ***X v Finland (2012)***, the safeguards against arbitrariness as regards the need for her continued confinement were found to be inadequate. The two doctors who decided to prolong her stay were from the hospital where she was confined and there had been no independent psychiatric opinion.



## C. Of a kind or degree warranting confinement

*The third condition is that the mental disorder must be of a kind or degree warranting compulsory confinement.*

- ▶ The term 'a person of unsound mind' does not lend itself to precise definition because psychiatry is an evolving field, both medically and in terms of social attitudes. However, it cannot be taken to permit the detention of someone simply because their views or behaviour deviate from established norms (*Rakevich v Russia*, 2003).
- ▶ The detention of a mentally disordered person may be necessary not only where s/he 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 (*Hutchison Reid v United Kingdom*, 2003).
- ▶ 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 them to evaluate the evidence adduced in a particular case (*Plesó v Hungary*, 2012; *HL v United Kingdom*, 2004).

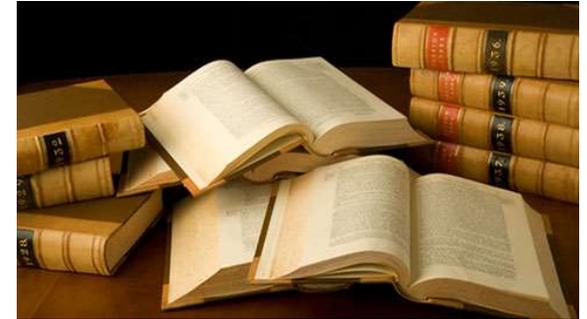


## D. Persistence of such a disorder

*The fourth condition is that 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 (*Luberti v Italy*, 1984).
- ▶ However, the continuation of a deprivation of liberty for purely administrative reasons is not justified (*RL and M-JD v France*, 2004).

## Case law on fourth condition



- ▶ In the ***Luberti Case (1984)***, 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)***, a tribunal ordered the applicant's discharge from a high secure hospital subject to a condition that he reside in a hostel. He was still in hospital 3½ years later because no hostel had been found for him. The court said that was of paramount importance that appropriate safeguards were in place to ensure that a person's discharge in such cases was not unreasonably delayed. There had been a breach of Article 5.

## Article 5(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.’



**Van der Leer (1990)**

- The word ‘arrest’ covers persons detained on the ground of unsoundness of mind



# Access to Justice: Article 5(4)

Article 5(4) provides that, '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.**'

- ▶ 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 and this extends to both the procedural and substantive justifications of the deprivation of liberty (*Idalov v Russia*, 2012).
- ▶ 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 (*Suso Musa v Malta*, 2013).



# The Article 5(4) principles

1. The Article 5§1(e) criteria for 'lawful detention' necessitates that the review should be made by reference to a mental health patient's contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments (*X v United Kingdom*, 1981).
2. A person 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 (*Ruiz Rivera v Switzerland*, 2014).
3. A system of periodic review in which the initiative lies solely with the authorities is insufficient on its own (*X v Finland*, 2012).
4. 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 (*Weeks v United Kingdom*, 1987). However, the procedure must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty (*A and Others v United Kingdom*, 2009).



# The Article 5(4) principles

5. The 'court' must:
  - ▶ be independent both of the executive and of the parties to the case (*Stephens v Malta (no. 1)*, 2009); and
  - ▶ have the power to order release if detention is unlawful. A mere power of recommendation is insufficient (*Benjamin and Wilson v United Kingdom*, 2002).
7. The review must comply with both 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 (*Koendjiharie v Netherlands*, 1990).
8. It is essential that the person concerned has the opportunity to be heard either in person or, where necessary, through some form of representation.
9. Special procedural safeguards (e.g. legal aid and/or representation) may be 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 (*Megyeri v Germany*, 1992).



# The Article 5(4) principles

10. The individual has the right to a speedy judicial decision. Whether a decision has been made 'speedily' must be determined in the light of the circumstances of the particular case (*RMD v Switzerland*, 1997).
11. The notion of 'speedily' (à bref délai) indicates a lesser urgency than that of 'promptly' (aussitôt) in Article 5§3 (*E v Norway*, 1990). However, where a decision to detain a person has been taken by a non-judicial authority, the standard of 'speediness' comes closer to the standard of 'promptness' under Article 5§3 (*Shcherbina v Russia*, 2014).
12. 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.
13. 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 (*Mooren v Germany*, 2009).
14. Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities (*E v Norway*, 1990).

# Medical evidence and Opinions



It can be seen that, except in an emergency, objective medical evidence is required under Article 5:

- ▶ For a person's original and continued deprivation of liberty to be lawful, a true mental disorder must be established before a competent authority on the basis of objective medical expertise. Except in an emergency, no deprivation of liberty conforms with Article 5 if it has been ordered without seeking the opinion of a medical expert.
- ▶ The term 'a person of unsound mind' cannot be taken to permit the detention of someone simply because their views or behaviour deviate from established norms (*Rakevich v Russia*, 2003). Furthermore, a mental condition must be of a certain gravity in order to be considered as a 'true' mental disorder (*Ruiz Rivera v Switzerland*, 2012).
- ▶ An independent psychiatric opinion is required at the very least in certain cases: See *X v Finland*, where both doctors were from the hospital where she was confined.
- ▶ The criteria for 'lawful detention' necessitates that the review required by Article 5(4) should be made by reference to a mental health patient's contemporaneous state of health, including their dangerousness, as evidenced by up-to-date medical assessments (*X v United Kingdom*, 1981).



## §3 — The Other Articles

# The Other Articles

- ▶ Article 2 (Right to Life)
- ▶ Article 3 (Inhuman or degrading treatment)
- ▶ Article 6 (Determination of civil rights)
- ▶ Article 8 (Respect for private and family life)





# Article 2 (Right to Life)

- ▶ 'Everyone's right to life shall be protected by law.'

## **The negative obligation**

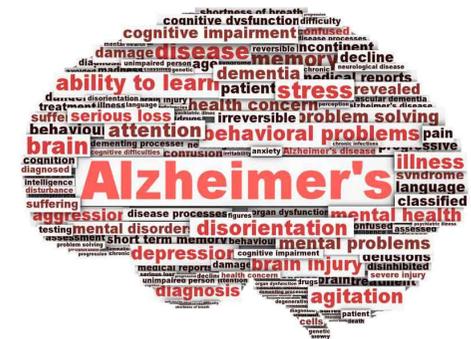
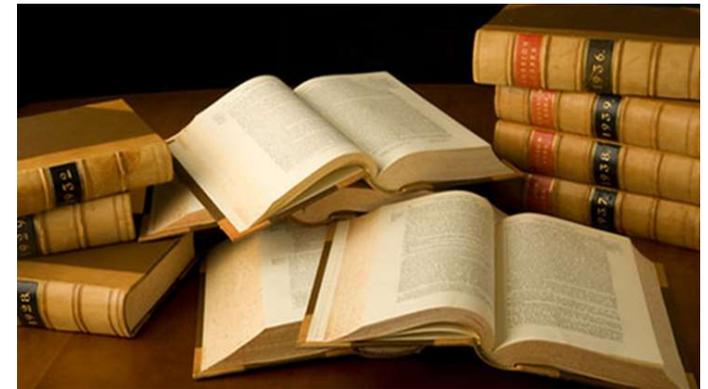
- ▶ State agents must refrain from acts of a life-threatening nature and acts which place the health of individuals at grave risk.

## **The positive obligation**

- ▶ States also have positive obligations under Article 2 to take appropriate steps to safeguard the lives of those within its jurisdiction.
- ▶ Mental health patients and persons in custody are in a vulnerable position and the authorities are under a duty to protect them. This duty includes making regulations which compel hospitals to adopt appropriate measures for the protection of patients' lives and appropriate investigation of patient deaths.
- ▶ This positive obligation must not be interpreted in a disproportionate way given the unpredictability of human behaviour and the operational choices faced by states in terms of priorities and resources (*Keenan v United Kingdom*, 2001).

## Dodov v Bulgaria (2008)

- ▶ This case concerned the disappearance from a state-run nursing home for the elderly of a patient called Mrs Stoyanova who was suffering from Alzheimer's disease.
- ▶ Nursing home staff had been instructed not to leave her unattended. However, a nursing orderly left her alone in the home's courtyard and, on returning to fetch her a few minutes later, found that she was no longer there. Mrs Stoyanova has never been seen since.
- ▶ The court found a violation of Article 2. Given the instructions never to leave her unattended, there was a direct link between the failure to supervise her and her disappearance. Furthermore, the legal system had not provided her son with the means to establish the facts surrounding his mother's disappearance and to bring to account those responsible, as required by Article 2.

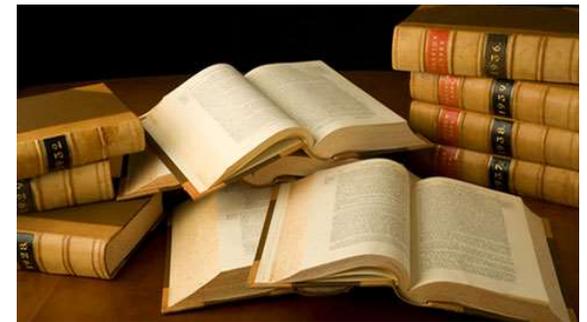


## ***Valentin Câmpeanu v Romania (2014)***

A young Roma man suffering from severe mental disabilities and HIV infection had spent his entire life in state care, having been abandoned at birth and placed in an orphanage. He was placed in a psychiatric hospital which had no facilities to treat HIV where he died at the age of 18. The conditions were known to be appalling.

The Grand Chamber found that there had been a violation of Article 2 in both its substantive and procedural aspects (no effective investigation).

Mr Câmpeanu had been placed in medical institutions which were not equipped to provide him with adequate care for his condition; he had been transferred from one unit to another without proper diagnosis; and the authorities had failed to ensure his appropriate treatment with anti-retroviral medication. The authorities were aware of the lack of personnel and heating and insufficient food in the psychiatric hospital and had unreasonably put his life in danger.





# Prisons and Article 2

There have been many cases dealing with prison suicides, e.g.

- ▶ *Keenan v United Kingdom (2001)*
- ▶ *Renolde v France (2008)*
- ▶ *Jasinska v Poland (2010)*
- ▶ *De Donder and De Clippel v Belgium (2011)*
- ▶ *Ketreb v France (2012)*
- ▶ *Coselav v Turkey (2012)*
- ▶ *Isenc v France (2016)*

Several of them involve the inappropriate seclusion or segregation of mentally ill detainees.

## Principles

- ▶ Regard must be had to the particular vulnerability of mentally ill detainees.
- ▶ The state has an obligation to take preventive operational measures to protect an individual whose life is at risk.
- ▶ The court will examine 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.



# Article 3 (Inhuman/Degrading Treatment)

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

Article 3 is cast in absolute terms, without exception, proviso or possibility of derogation. It is one of the most fundamental Convention provisions and enshrines the core values of the democratic societies making up the Council of Europe. 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.

## **The negative obligation**

- ▶ State agents must refrain from acts which subject the citizen to inhuman or degrading treatment.

## **The positive obligation**

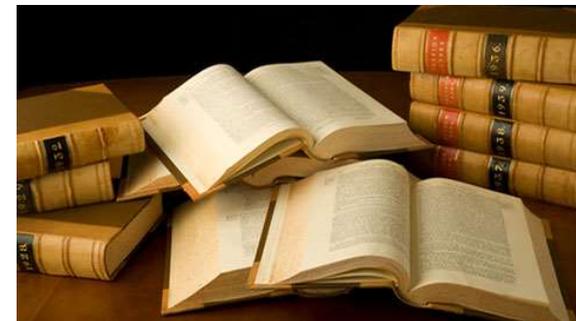
- ▶ The state may be required to take positive measures to protect the physical and mental health of individuals for whom it assumes special responsibility. There is a particular need for states to take such measures in the context of psychiatric hospitals, where patients are typically in a position of inferiority and helplessness (*Herczegfalvy v Austria*, 1992).
- ▶ The Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population. However, the court will have regard for healthcare standards set down within the framework of the Council of Europe. In effect, there is no guarantee to high quality healthcare or a particular treatment (*Wasilewski v Poland*, 1999) but a minimum standard of healthcare is guaranteed to vulnerable detainees, in particular those suffering from mental disorder.

## ***Dordevic v Croatia (2012)***

Dalibor Dordedic was a man with learning and physical disabilities aged in his mid-30s who suffered a sustained program of abuse and harassment at the hands of children attending a school some 70 metres from his home.

The court considered that this harassment, which on one occasion caused him physical injuries, when combined with feelings of fear and helplessness, was sufficiently serious to invoke the protection of Article 3. According to the court, Article 3:

'requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals ... These measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.'



# Medical treatment

**As a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading**

*Herczegfalvy v Austria*  
(1992)



# Conditions of detention

The court has reiterated on many occasions that the state is required to ensure that all persons deprived of their liberty:

- ▶ are detained in conditions which are compatible with respect for their human dignity;
- ▶ that the manner and method of the execution of the measure does 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 or confinement, their health and well-being are adequately secured.



## PSYCHIATRIC HOSPITAL CONDITIONS

Patients were likely to catch scabies or become infested with lice, sometimes two patients had to share a bed, two showers for 70–100 patients, poor food (*Parascineti v Romania, 2012*).

### SECLUSION IN A PSYCHIATRIC HOSPITAL

Patient deprived of adequate furnishing and clothing, cell insanitary and inadequately lit and ventilated. Friendly settlement (*A v United Kingdom, 1980*).

Seclusion cell contained only a bed and a flush toilet and no table or chair. It had only one small window which was situated above eye-level. Detainee had his daily exercise in a courtyard separate from other inmates. Meals were served in his cell (*Dhoest v Belgium, 1997*).

## SOCIAL CARE HOMES

- ▶ Residents' diet contained no milk or eggs and only rarely fruit and vegetables; building inadequately heated and in winter Mr Stanev had to sleep in his coat; could shower only once a week in an unhygienic and dilapidated bathroom; toilets in an execrable state; residents led passive, monotonous lives.
- ▶ Held that Article 3 prohibits the inhuman and degrading treatment of anyone in the care of the authorities. The lack of financial resources was not a relevant argument which justified keeping Mr Stanev in such conditions. Taken as a whole, his living conditions for a long period of approximately seven years amounted to degrading treatment, in violation of Article 3 (*Stanev v Bulgaria, 2012*).

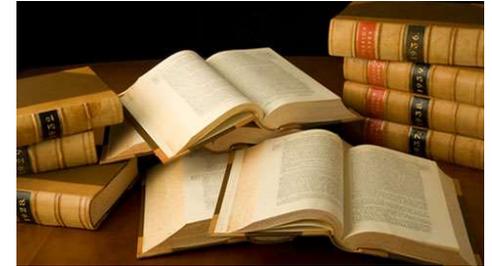


# Article 6

**Article 6(1) provides that in the determination of their civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'**

- ▶ Article 5(4) entitles a person to a review of their deprivation of liberty but many persons suffering mental ill-health are subject to restrictions of other kinds, e.g. findings in relation to legal capacity and guardianship.
- ▶ Article 6 is an important protection for citizens in relation to legal proceedings which do not involve challenging a deprivation of liberty.

## Case law on Article 6



- ▶ In ***Shtukaturov v Russia (2008)***, the applicant had a history of mental illness. Following a request filed by his mother, the Russian courts declared him legally incapable. The court found that the procedures breached Article 6. He had not been given any opportunity to participate in the proceedings. His attendance had been indispensable not only to give him the opportunity to present his case, but also to allow the judge to form an opinion on his mental capacity.
- ▶ In ***Stanev v Bulgaria (2012)***, the court observed that, according to a recent study, 18 out of 20 national European legal systems allowed direct access to the courts for any partially incapacitated person who wished to have their status reviewed. In 17 countries such access was even open to those declared fully incapable. Article 6§1 should be interpreted therefore as guaranteeing in principle that anyone in Mr Stanev's position must have direct access to a court to seek restoration of their legal capacity. There had been a violation of Article 6§1.
- ▶ ***Blokhin v Russia (2016)*** concerned the detention for 30 days in a temporary detention centre for juvenile offenders of a 12-year old boy suffering from a mental and neuro-behavioural disorder. He was questioned by the police in the absence of his guardian, legal counsel or a teacher. He was not given the opportunity to cross-examine the two witnesses against him. The court found a breach.



# Article 8

**Article 8 provides that everyone has the right to respect for their private and family life, home and correspondence.**

**There must be no interference by a public authority with the exercise of this right except such as is in accordance with the law, is necessary in a democratic society and is for one of the purposes expressly permitted by Article**

- ▶ 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' (*Sidabras v Lithuania*, 2004).
- ▶ It protects the moral and physical integrity of the individual, including the right to live privately away from unwanted attention (*X and Y v Netherlands*, 1985).
- ▶ States are under a positive obligation to secure the right to effective respect for physical and psychological integrity.
- ▶ This obligation may require the state to take measures to provide effective and accessible protection of the right to respect for private life, through both a regulatory framework of adjudicatory and enforcement machinery and the implementation, where appropriate, of specific measures (*Tysiāc v Poland*, 2007).

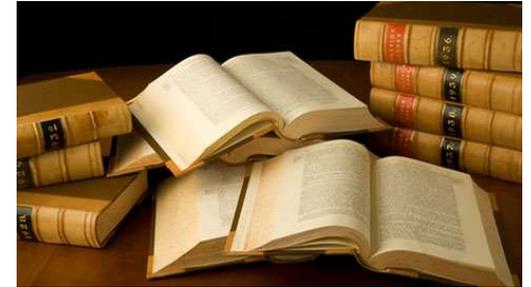


# Article 8 principles



- ▶ The right to respect for one's private life includes the right to refuse medical treatment or to request a particular form of medical treatment (*Glass v United Kingdom*, 2004)
- ▶ 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 an individual suffering mental ill-health with those of the whole community.
- ▶ Unlike Articles 5 and 6, Article 8 contains no explicit procedural requirements. However, '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'.
- ▶ The extent of the state's margin of appreciation turns partly on the quality of the decision-making process and the importance of the interests at stake. A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life (*Shtukaturov v Russia*, 2008)

## ***Shtukaturov v Russia (2008)***

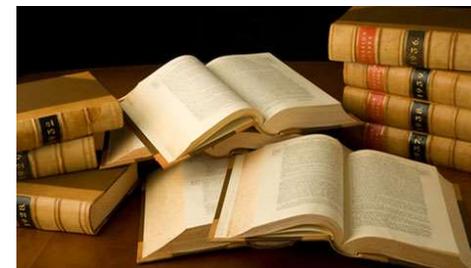


The applicant had a history of mental illness. A Russian court declared him legally incapable on 28 December 2004. This decision deprived him of his capacity to act independently in almost all areas of life: he was no longer able to buy or sell any property on his own, to work, to travel, to choose his place of residence, to join associations or to marry. Even his liberty could be limited without his consent and without any judicial supervision.

The court found a violation of Article 8 as a result of the applicant being fully deprived of his legal capacity. The principles for the legal protection of incapable adults set down by the Council of Europe's Committee of Ministers recommended that legislation should provide a 'tailor-made' response to each individual case. However, Russian legislation distinguished only between full capacity and full incapacity and made no allowances for borderline situations.

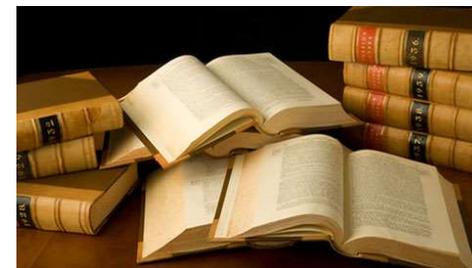
Consequently, the Mr Shtukaturov became fully dependent on his official guardian in almost all areas of his private life for an indefinite period when that was disproportionate to the government's legitimate aim of protecting his interests and health of others. Furthermore, his participation in the decision-making process had been 'reduced to zero'.

## Other Article 8 cases



- ▶ In ***Grare v France (1983)***, a voluntary in-patient complained that his treatment with antipsychotic drugs resulted in unpleasant side-effects which violated Article 8. It was held that, even if the treatment regime constituted an invasion of his private life, it was justified in the interests of his health and public order.
- ▶ In ***Acmanne v Belgium (1983)***, compulsory tuberculosis screening was held not to breach Article 8 although it interfered with the individual's private life.
- ▶ In ***TV v Finland (1994)***, it was held that access by prison and medical staff to information regarding the applicant's HIV status could be justified under Article 8(2). Such access was lawful, necessary to protect the rights and freedoms of others and proportionate.
- ▶ In ***Szuluk v United Kingdom (2009)***, a prisoner who had undergone brain surgery discovered that his correspondence with the specialist supervising his hospital treatment had been monitored by a prison medical officer. The court found a violation of his right to respect for his correspondence under Article 8.

## Other Article 8 cases



- ▶ In ***Herczegfalvy v Austria (1992)***, the applicant complained about a psychiatric hospital's practice of sending all of his letters to the curator for him to select which ones to pass on. The court held that the domestic law did not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society. In particular, the very vaguely worded statutory provisions did not specify the scope or conditions of exercise of this discretionary power. There had been a violation of Article 8.
- ▶ The case of ***A-MV v Finland (2017)*** concerned an intellectually disabled man's complaint about the Finnish courts' refusal to replace his court-appointed mentor, which had the effect that he had been prevented from deciding where, and with whom, he would like to live. The court found no violation of Article 8. The Finnish courts' decision to refuse to replace the mentor was reached following a concrete and careful consideration of the applicant's situation. The applicant had been involved at all stages of the proceedings and his rights, will and preferences had been taken into account by competent, independent and impartial domestic courts.



# Convention on the Rights of Persons with Disabilities



# Background

- ▶ The Convention was adopted by the United Nations General Assembly on 13 December 2006.
- ▶ Following ratification by the twentieth party, it came into force on 3 May 2008.
- ▶ As of April 2017, the Convention has 160 signatories and 173 parties. The European Union ratified it on 23 December 2010.



# Equal recognition before the law (Article 12)

- ▶ 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 interpretation of Article 12



- ▶ In the ECHR case of **A-MV v Finland (2017)**, the court rejected a central tenet of the interpretation of Article 12 of the UNCRPR, namely that the will and preferences of an individual should always be determinative of any decision taken in their name.

*A-MV v Finland*, no. 53251/13, 23 March 2017

- ▶ The Court considered that a proper balance was struck in the AM-V's case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law which ensured that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to his circumstances and was subject to review by competent, independent and impartial domestic courts.

# Access to Justice (Article 13)

- ▶ 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.





# Liberty and security of the person (Article 14)

- ▶ 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.