EUROPEAN JOURNAL OF HEALTH LAW 30 (2024) 585–601

European Journal of Health Law

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European Court of Human Rights

ECHR 2023/12 *Case of A.D. and Others v. Georgia, 1 December 2022, nos. 57864/17, 79087/17 and 55353/19* (*Fifth Section*)

The Facts

The three applicants are transgender men (assigned female at birth). Following successful applications to the Civil Status Agency between 2011 and 2015, their forenames were changed from traditionally female names to traditionally male ones in their civil-status records. They also received medical certificates from psychologists diagnosing them with "gender identity disorder (transsexualism)".

Backed by those certificates each of the three applicants requested legal gender recognition — that is to have their gender changed in their civil-status records from female to male. Prior to that, the second and the third applicant had undergone hormonal treatment to increase testosterone levels and the second applicant had had a mastectomy. Their requests were rejected by the agency on the ground that they had not shown that they had undergone medical sex reassignment procedures.

The applicants lodged complaints with the courts. During the court proceedings, the agency acknowledged that domestic law did not define which exact medical procedures were necessary or what kind of medical proof was required in order for a "change of sex" to take place within the meaning of the Civil Status Act. However, it maintained that a medical certificate proving that their biological and/or physiological sex characteristics had been changed was necessary. The city court dismissed their complaints, reasoning that gender self-identification was not sufficient, since a precondition for changing the gender in the civil-status records was, according to the Civil Status Act, sex reassignment. As none of the applicants had undergone any of the existing sex reassignment procedures, their request for legal gender recognition could not be allowed. Whilst the court stipulated that the applicant's sex could be changed by way of medical procedures, it did not specify exactly what those procedures were. However, it concluded that only post-operative transgender people were entitled, after changing sex, to obtain legal gender recognition.

Published with license by Koninklijke Brill NV | DOI:10.1163/15718093-BJA10116
 | ISSN: 0929-0273 (print) 1571-8093 (online)

In October 2017, the court of appeal dismissed their appeals. It stated that, although several European countries had opted for allowing a change of gender in civil-status records on the basis of a person's gender self-identification, Georgian law was clear in making the matter contingent upon sex reassignment "by means of surgery". It went on to specify that it was important "for any medical procedures undertaken with the aim of changing sex to have an irreversible impact, and this irreversibility cannot be achieved by means of hormonal treatment only. The change of a secondary sex characteristic cannot in and of itself show a change of sex."

The Law

Alleged Violation of Article 8 of the Convention

Relying on Article 8 (which protects the right to respect for private life), the applicants complained about their inability to have their sex/gender markers changed in civil-status records.

The Court reiterates that in implementing their positive obligations under Article 8, States enjoy a certain margin of appreciation. However, as regards a most intimate part of an individual's life, namely the right to gender identity, the Court has often emphasised that the Contracting States have a narrow margin of appreciation.

The Court notes that not only has the Georgian legislator clearly enshrined in law (the Civil Status Act) a right to one's sex marker changed in civil-status records; it also forms part of the relevant constitutional right to free development of personality under the Constitution. Furthermore, the Court has stated in its case-law on legal gender recognition, that what member States are expected to do under Article 8 of the Convention is to provide quick, transparent and accessible procedures for changing the registered sex marker of transgender. From the point of view of the latter, very specific positive obligation will the Court in the present case assess whether, in view of the margin of appreciation available to it, the respondent State struck a fair balance between the general interest and the individual interest of the applicants in having their sex/gender marker changed in the civil-status records, and by extension in all their official identity documents, to match their gender identity.

The key problem in the present case is that it is not clear at all what the legal regime for the change of the sex/gender marker actually is in Georgia. Namely, whilst there is a provision in the domestic law that allows the alteration of a person's sex/gender marker in civil-status records, the law is silent about the terms and conditions to be fulfilled and, if so required, the medical

procedures to be followed for legal gender recognition to take place. It is noteworthy that despite the fact that such a right has existed in the country since 1998, not a single case of successful legal gender recognition has been reported to date.

The Court observes that the Government forcefully argued that the expression "change of sex" in the Civil Status Act had to be assessed on "biological, physiological and/or anatomical criteria". However, considering the lack of any legislative clarification, it is not clear what their reading of the law is based on. Indeed, the utmost care and precision is required when using such different terms interchangeably, because each of those terms has its own particular meaning and entails distinct legal implications. For example, to the extent that "change of sex" is to be defined on the basis of biological criteria, it would never be possible to obtain legal gender recognition, as chromosomes cannot be changed by any amount of medical intervention.

The Court is of the opinion that the inconsistencies in the reading of the domestic law by the domestic courts were conditioned, at least in part, by the fact that the law itself is not sufficiently detailed and precise. Incidentally, the same findings about the poor quality of the domestic law have been expressed by relevant international bodies. The imprecision of the current legislation undermines the availability of legal gender recognition in practice and the lack of a clear legal framework leaves the gatekeepers — the competent domestic authorities — with excessive discretionary powers, which can lead to arbitrary decisions in the examination of applications for legal gender recognition.

For these reasons, the Court holds, unanimously, that there has been a violation of Article 8 of the Convention; declares.

ECHR 2023/13 *Case of Yakovlyev v. Ukraine, 8 December 2022, no. 42010/18* (*Fifth Section*)

The Facts

In November 2014 the applicant was found guilty of robbery and was sentenced to nine years' imprisonment. On 22 January 2018 at least ten prison inmates, including the applicant, went on hunger strike in protest against the conditions of detention and the attitude of the prison officials. Three days later, the applicant was placed in a disciplinary cell for two weeks ostensibly for having refused to clean the walking yard.

On 29 January he was examined by the head of the prison's medical unit and a primary health care doctor, who diagnosed that he was suffering from starvation, lower than normal potassium levels (hypokalaemia), exacerbation of chronic pancreatitis and general poisoning of his system. They felt that he should be force-fed. The city court granted the prison governor's application for immediate enforcement of force-feeding on 31 January 2018.

From 1–5 February 2018, the applicant was subjected to force-feeding on a daily basis. He described having his hands handcuffed behind his back and being held down by several prison officers whilst one of the prison officers forced a rubber tube down his throat causing severe pain and making him choke. The process lasted between 30–90 minutes.

On appeal the applicant submitted that such treatment amounted to torture. The appellate court rejected his appeal. On 6 February 2018 he ended his hunger strike.

The Law

Alleged Violation of Article 3 of the Convention

The applicant complained that his force-feeding had been in breach of Article 3 of the Convention, which forbids inhuman or degrading treatment.

The Court observes at the outset that the applicant did not argue that he should have been left without any food or medicine regardless of the possible lethal consequences. Instead, he complained of the lack of any medical necessity for his force-feeding and the cruelty of that procedure.

The Court notes that, as soon as the applicant informed the prison administration of his hunger strike, that is, on 24 January 2018, he was examined by the head of the prison's medical unit. Following a repeated medical examination on 29 January 2018, some changes in the applicant's body indicators that were the inevitable consequences of several days of fasting (in particular, reductions in blood pressure and sugar level, as well as some insignificant weight loss) were reported. Although the doctor considered that the applicant's medical condition did not call for hospitalisation, he concluded, without providing sufficient explanation as to what had led him to that conclusion, that the applicant's force-feeding was required to save his life and health. The city court accepted that conclusion as sufficient grounds for ordering the applicant's force-feeding, even though the latter, being fit enough to participate in the hearing in person, claimed that there had been no serious deterioration of his health and that there would be no justification for his force-feeding from a medical point of view.

All these elements — namely the lack of any explanation in the medical report in question of the nature and imminence — especially given the relatively short time passed since the beginning of the hunger-strike — of the risk of the applicant's continued fasting to his life, the absence of any need for his hospitalisation, and his satisfactory health condition allowing him to attend the court hearing — indicate that the medical necessity for the applicant's force-feeding was not convincingly shown to exist.

Although the applicant insisted that, apart from some general weakening, he felt well and that he did not understand what made the doctors think otherwise to the point of seeking his force-feeding, the judge ordered the applicant's force-feeding without having duly responded to that legitimate concern and without having explored alternative means to avert the alleged risk to the applicant's health. Nor did the court comment on the applicant's submission about the absence of any legally established procedures for force-feeding in Ukraine. As regards the appellate court, it simply dismissed the applicant's arguments as "groundless" and "not worthy of attention". That being so, the Court has doubts as to the effectiveness of the judicial control as a procedural safeguard against abuse in the circumstances of the present case.

Furthermore, the applicant's force-feeding was carried out in the absence of any legal regulations on the procedures to be followed in such cases. This lacuna was observed, in particular, by the Ombudsman, who noted that "any prison staff member [could] carry out ... force-feeding at his entire discretion". The existence of such unfettered discretion for the prison staff in carrying out the applicant's force-feeding, together with the lack of any evidence as to how it actually took place, are sufficient for the Court to accept the applicant's account of the events, according to which he suffered excessive physical restraint and pain.

For these reasons, the Court holds, unanimously, that there has been a violation of Article 3 of the Convention

ECHR 2023/14 *Case of Bjerg v. Denmark, 13 December 2022, no. 11227/21* (*Fourth Section*)

The Facts

On 21 November 2013 the applicant, born in 1990, was found guilty of making threats and witness tampering. Having found that he was suffering from a mental disorder, he was sentenced to treatment in a psychiatric ward. The

applicant was admitted to a psychiatric ward on 17 December 2013 and discharged on 3 January 2014. Subsequently, he took up residence in an institution, where a "coordination plan" was drawn up for his stay.

In accordance with the terms set out in the treatment sentence, the applicant was readmitted to the psychiatric ward several times, including from 12 to 15 June 2018, from 21 to 24 September 2018 and from 26 September to 3 October 2018. The three readmissions lasted from four to eight days. The applicant requested a judicial review of the lawfulness of the readmission decisions. In his view, he had been readmitted only as a punishment for not complying with the coordination plan, including for having left the institution without permission.

By a decision of 12 August 2020 the Supreme Court dismissed the case. In the meantime, on 9 January 2020, the High Court revoked the sentence at the request of the applicant, finding that the conditions for maintaining his sentence of psychiatric treatment were no longer met.

The Law

Alleged Violation of Article 5 para. 4 of the Convention

Relying on Article 5 para. 4, which protects the right to liberty and security, the applicant complained that he had not had a judicial review of the lawfulness of the three specific readmissions decisions, all ordered on the basis of his sentence of treatment in a psychiatric ward imposed on 21 November 2013.

The Court reiterates that it is primarily for the national authorities to interpret and apply domestic law. The scope of the Court's task is subject to limits inherent in the subsidiary nature of the Convention, and it cannot question the way in which the domestic authorities have interpreted and applied national law, except in cases of flagrant non-observance or arbitrariness. In the present case, the Court cannot find any grounds on which to criticise the Supreme Court's finding that the applicant did not have a right to a judicial review of the three readmission decisions under the Penal Code.

The Supreme Court did not find any basis for concluding that the lack of judicial reviews of the applicant's three readmissions to a psychiatric ward had been contrary to Article 5 para. 4 of the Convention, notably because he had had the possibility of requesting a judicial review of the potential amendment or revocation of the sentence every six months under the Penal Code.

It should be noted that, in the meantime, the applicant had in fact availed himself of that possibility, and that the High Court revoked his sentence on 9 January 2020. It appears that this was the first time that the applicant had applied to have his sentence revoked and that he had done so after the issuing and the execution of the three contested readmission decisions.

The Court notes the specific type of deprivation of liberty, where a person convicted in criminal proceedings has been sentenced to treatment in a psychiatric ward, with the possibility of being discharged and readmitted at the request of the ward in collaboration with the Department of Prisons and Probation. Since such deprivation of liberty depends on the person's mental state, which may change rapidly, a certain flexibility is required regarding the manner of the organisation of the judicial review. If for each and every readmission, no matter how short the duration, a request had to be submitted to the courts, this might lead to hesitation on the part of the ward and the Department of Prisons and Probation in discharging a convicted person from the ward.

In these circumstances, the Court is satisfied that the possibility of judicial review of the measure as such (whether to lift or uphold), guaranteed by the Penal Code, every six months after the most recent decision, suffices to meet the requirements of Article 5 para. 4, and when the applicant is granted access to such review, even with regular intervals, Article 5 para. 4 cannot be interpreted as requiring, in addition, a judicial review of each and every decision to discharge or readmit the applicant.

For these reasons, the court, unanimously, holds that there has been no violation of Article 5 para. 4 of the Convention.

ECHR 2023/15 *Case of Machina v. The Republic of Moldova, 17 Januari 2023, no. 69086/14* (*Second Section*)

The Facts

Since a spinal cord trauma in 2003, the applicant, born in 1985, has suffered from spastic paraplegia (muscle weakness and stiffness affecting the lower limbs). She was in prison from 14 February 2011 to 7 July 2016 serving a custodial sentence.

The applicant was not screened for any transmissible diseases such as human immunodeficiency virus (HIV) or HCV upon her arrival in prison, although her past drug use was noted in her medical file. On 15 February 2012 a blood test, carried out at the applicant's request to investigate the cause of a pain in her right flank, revealed that she was infected with HCV. She was diagnosed with chronic HCV with "[zero] activity".

According to her prison medical file, the applicant was diagnosed on various occasions with respiratory infections, dermatitis and otitis, and was prescribed antibiotics, painkillers and other medication. There are a few records of this medication being administered. The applicant was regularly prescribed drug substitution therapy. She often attended medical consultations for pain in her legs and back related to her paraplegia. On various occasions she was prescribed anti-inflammatory treatment and painkillers. In 2013 she was examined by an orthopaedist, who recommended additional examinations and surgery on her legs.

The applicant was provided with dental services on at least six occasions, including on 13 May 2011, when she claimed to have contracted HCV. In respect of her HCV diagnosis, the applicant was twice examined by the prison doctor, in February and August 2012, and was prescribed a special diet, hepatoprotectors and antispasmodics. There are no records of this medication being administered or of any blood tests to establish the applicant's HCV viral load.

The applicant was provided with inpatient treatment on four occasions, mainly for her paraplegia (anti-inflammatory treatment). There is no record of any inpatient medical assistance related to HCV

This summary is restricted to the issues raised under Article 3 of the Convention.

The Law

Alleged Violation of Article 3 of the Convention

Relying on Article 3 (which forbids inhuman or degrading treatment) the applicant complained that she had not been provided with adequate medical assistance and that she had been infected with HCV in prison.

1. Alleged infection with HCV in prison

The requirements imposed on a State with regard to detainees' health may differ depending on whether the disease contracted was transmissible or non-transmissible. The spread of transmissible diseases and, in particular,

tuberculosis, hepatitis and HIV/Aids, should be a public health concern, especially in the prison environment. On this matter, the Court considers it desirable that, with their consent, detainees undergo, free screening tests for hepatitis and HIV/Aids within a reasonable time after their admission to prison. An unreasonable delay in screening for HCV is incompatible with the respondent State's general obligation to take effective measures aimed at preventing the transmission of HCV and other contagious diseases in prisons.

In the present case, the national authorities found that the applicant's allegations were unsubstantiated because there was no information that the applicant had ever been tested for HCV prior to her detention on 14 February 2011. Although the applicant's complaints refer to concrete facts which could have been investigated, the national authorities did not carry out any investigation — internal, disciplinary or criminal — to assess the risk of infection in prison through dental services. The Court finds it striking that the prison administration did not keep a record of HCV-infected inmates or carry out a simple check to investigate if any other inmates who had had dental services in the same period of time were positive for HCV.

The Court has frequently held that the obligation to investigate, which stems from Articles 1 and 3 of the Convention, "is not an obligation of results, but of means". What this means is that the domestic authorities are not obliged to come to a conclusion which coincides with the claimant's account of events. However, any investigation carried out by the authorities should in principle be capable of leading to the establishment of the facts of the case and the potential identification and punishment of those responsible. Thus, an investigation into serious allegations of treatment contrary to Article 3 of the Convention must be thorough and the authorities must always make a serious attempt to find out what happened.

The Court notes that the applicant submitted complaints to the domestic authorities about her alleged infection with HCV while in prison. In the course of proceedings before the Equality Council and the investigating judge, the prison doctor argued that the applicant had become infected before incarceration through sexual contact. On no occasion was there any attempt to investigate the applicant's version of facts.

The Court reiterates that, in all cases where it is unable to establish the exact circumstances of a case for reasons objectively attributable to the State authorities, it is for the respondent Government to explain, in a satisfactory and convincing manner, the sequence of events and to exhibit solid evidence capable of refuting the applicant's allegations. Moreover, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in

the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim. In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government. That is justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them.

The Court cannot but conclude that the national authorities made no real attempt to find out what happened and that the delay in carrying out a screening (one year after incarceration) undermined any possibility to assess whether the applicant was infected with HCV after her incarceration.

2. Alleged inadequacy of medical care in prison

The applicant was diagnosed with chronic HCV in an inactive phase, but it is unclear how this diagnosis was established considering that no assessment of viral load was carried out throughout the entire duration of her detention. In this connection, the Court considers irrelevant the Government's submission that the applicant had been receiving treatment, since, as a consequence of the lack of adequate medical examinations, the exact effect of HCV on her health had not been established and therefore she could not have been provided with adequate medical care. There is no evidence that the applicant was ever examined by a specialist doctor or that the prescribed HCV medication had ever actually been administered

For these reasons, the court, unanimously, holds that there has been a violation of Article 3 of the Convention with regard to both the State's failure to prevent the transmission of HCV in prison and the absence of necessary medical care in prison.

ECHR 2023/16 *Case of Hubert Nowak v. Poland, 16 February 2023, no. 57916/16* (*First Section*)

The Facts

At around 11.30 p.m. on 2 January 2006 the applicant, was involved in a road accident in Warsaw. He lost control of his car, which overturned and hit an

electricity pylon. The ambulance arrived within five minutes. Ten minutes later the police and firefighters arrived.

The police, firefighters and the doctor at the scene, A.M., waited for an electrical engineer to arrive. They did not approach the car because of the risk of electrocution. During this period of about thirty-five minutes, no medical attention was given to the applicant, who was unconscious and trapped in the car. The electricity supply was cut off at 12.07 a.m.

A.M. examined the applicant through a smashed car window. His findings were that the applicant had no pulse, was not breathing and that his pupils were not reacting to light. He informed the police and firefighters that the applicant was dead. A.M. approached the applicant twice more and repeated the same examination through the smashed window.

At 12.30 a.m. on 3 January 2006 a police officer noticed that the applicant was moving his lips and eyes slightly. The ambulance was called back to the scene. The applicant was removed from the car at 12.50 a.m. and given medical attention. He was unconscious, breathing and had minor injuries.

The applicant was transported to a hospital in Warsaw. He was in a coma for at least a month after the accident, and was then diagnosed with severe brain damage.

The Law

Alleged Violation of Article 2 of the Convention

The applicant complained that the authorities had failed both to protect his right to life and to carry out an effective and thorough investigation into his allegation of medical negligence. The Court considers that the applicant's complaints should be examined from the standpoint of Article 2 (which protects the right to life) under its substantive and procedural aspects.

1. The substantive aspect

The Court notes that the course of the rescue operation after the applicant's road accident has been subjected to domestic scrutiny. The assessment of the actions of the firefighters and the doctor was not straightforward, as some medical expert opinions reached contradictory conclusions. It should be noted that A.M. did examine the applicant, albeit in a manner ultimately considered to be inadequate, and remained at the scene together with the police and firefighters. Once his error had been noticed, the ambulance was called back, the firefighters removed the applicant from the wreckage and medical

attention was provided to him. He was immediately transferred to hospital, where further medical treatment was provided to him. In the disciplinary proceedings, the authorities did not establish any error in the way in which A.M. had examined the applicant. However, the criminal court accepted the opinion of the experts that it had been incorrect for A.M. not to have had the applicant removed from the car in order to perform a full general examination and to have pronounced him dead on the basis of a superficial examination through a smashed car window. The Court takes note of the fact that the conviction of A.M. at first-instance was quashed as time-barred by the appellate court.

Even assuming that the applicant could be considered as having received deficient, incorrect, or delayed treatment, it cannot be concluded that the emergency services knowingly put his life in danger by denying him access to life-saving emergency treatment.

The present case concerns allegations of medical negligence. In these circumstances Poland's substantive positive obligations are limited to the setting-up of an adequate regulatory framework compelling emergency services and hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. The Court considers that the relevant regulatory framework does not disclose any shortcomings as regards the State's obligation to protect the right to life of the applicant.

2. The procedural aspect

The Court will first look at the criminal proceedings. It recognises the complexity of the case; nevertheless, ten years after the accident which left the applicant tetraplegic, and some six years after the applicant had lodged a subsidiary bill of indictment, the proceedings had to be discontinued as the charges against A.M. had become time-barred. In consequence, the applicant and his family, who had actively participated in the proceedings, lodging appeals against multiple decisions of the prosecutor to discontinue the investigation and pursuing the subsidiary bill of indictment, saw the first-instance conviction of A.M. quashed simply because the proceedings had gone on for too long.

The Court further notes that the civil proceedings for compensation have been ongoing for almost thirteen years before the first-instance court and that no ruling has been given. The disciplinary proceedings against the doctor had also been discontinued.

The Court concludes that the relevant mechanisms of the domestic legal system, taken as a whole, did not secure in practice an effective and prompt response on the part of the authorities consistent with the State's obligations under Article 2.

For these reasons, the court, unanimously, holds that there has been no violation of Article 2 in its substantive aspect; and that there has been a violation of Article 2 in its procedural aspect.

ECHR 2023/17 *Case of Mayboroda v. Ukraine, 13 April 2023, no. 14709/07* (*Fifth Section*)

The Facts

The applicant was born in 1952 and died in 2016 while the proceedings before the European Court were still ongoing. Her daughter continued the application in her stead.

In March 2000 the applicant had her left adrenal gland surgically removed. She was suspected of having developed post-operative internal bleeding, and so urgent surgery was performed. Having obtained the applicant's oral consent a team of three doctors operated. In the course of the procedure the applicant's left kidney, previously diagnosed as healthy, was removed. She was discharged one month and five days later. The discharge certificate did not mention the removal of her kidney

Later that year she received an anonymous telephone call stating that her kidney "had been stolen". She contacted the press, which led to a senior university faculty member who was the father of the applicants consulting doctor writing a letter to her to apologise, explaining that no information had been given in order to facilitate recovery, and that it had been intended to inform her at her next appointment.

In September 2000 the applicant complained to the national Ombudsman, which led to a prosecutor questioning a doctor involved. Separately, criminal proceedings were initiated against one of the treating doctors on suspicion of abuse of a position of authority and forgery of an official document. Those proceedings were ultimately discontinued. No other criminal investigations were opened in relation to her other complaints.

In 2002 the applicant brought a civil case against her consulting doctor and the operating surgeon, the hospital, and the university to which the above doctors were affiliated. In 2005 the district court found in her favour as regards her case against one of the doctors (I.P.), stating that he had breached his duties. Her appeal and a subsequent application for leave to lodge an appeal on points of law were unsuccessful.

The Law

Alleged Violation of Article 8 of the Convention

The applicant complained that the respondent State had failed to protect her from removal of a kidney without her informed consent and from the concealment of the relevant information by her physicians in the post-operative period. The Court considers that the complaints fall to be examined under Article 8 of the Convention (right to respect for private life).

1. Failure to protect the applicant's right to informed consent

General principles

The Court reaffirms that although the right to health is not as such among the rights guaranteed under the Convention and the Protocols thereto, the States have, parallel to their positive obligations under Article 2 of the Convention, a positive obligation under Article 8, firstly, to have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients' physical integrity and, secondly, to provide victims of medical negligence with access to proceedings in which they may, where appropriate, obtain compensation for damage. This latter procedural obligation will be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress to be obtained. Disciplinary measures may also be envisaged.

The Court further reiterates that the patients' right to informed consent to medical interventions has occupied a prominent place in its case-law. It has been established that the States are bound to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable consequences for their patients' physical integrity of a planned medical procedure, and to inform patients of these consequences beforehand, in such a way that they are able to give informed consent. As a corollary to this, if a foreseeable risk of this nature materialises without the patient having been duly informed in advance by doctors, the State concerned may potentially be liable under Article 8 for this lack of information.

A positive obligation of the State to put in place a regulatory framework must be understood in a sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement.

At the same time, as long as the State has taken the necessary measures for securing high professional standards among healthcare professionals and protecting both the physical and mental integrity of patients, matters such as an error in judgment on the part of a healthcare professional or poor coordination between such professionals in the context of a particular patient's treatment are not in themselves sufficient to hold a State accountable for a breach of the positive obligations under Article 8.

Application to the present case

The Court notes that the patients' right to informed consent to medical interventions was guaranteed by the Law on the Fundamentals of Health Protection Legislation (FHPL). At the same time, the Court observes that the assessment of the adequacy of the relevant legal framework must include analysis of its functioning in practice, including the interaction between the general rule and any regulations and guidelines of lower level that exist or may be necessary in order to ensure the requisite protection.

In the present case, it has been established at the domestic level that the applicant's kidney had been removed in urgent circumstances, as the only available means of halting a life-threatening internal bleeding. That is, the intervention took place in a situation, which, according to the FHPL, exceptionally authorised medical interventions without patients' consent. The Court notes in this respect that emergency medical interventions on life-saving grounds performed in absence of patients' consent are not as such incompatible with the Convention.

However, the particularity of the present case is that the applicant's consent to the disputed surgical intervention was sought and, indeed given, albeit without any discussion as regards a possible kidney removal to achieve the stated aim of halting the bleeding. Based on the available material the Court cannot assess whether the applicant's medical team should have reasonably foreseen a possibility that the applicant's kidney might need to be removed or whether there was a genuine opportunity to consult her relatives during the operation, without jeopardising the primary interest in saving her life. At the same time, in the Court's view, these questions were of significant importance in establishing the scope of her caregivers' duty to seek her informed consent.

However, neither the civil courts, nor the authorities, which carried out the official inquiries and ordered expert conclusions in that context, scrutinised the relevant matters in detail. Instead, they essentially confined their analysis to a general finding that the applicant's kidney had been removed on life-saving grounds. It appears from the file that the flaws of the inquiry stemmed from

the lack of necessary guidelines, regulations, professional standards, hospital records or other pertinent documents.

In this respect the Court notes, firstly, that insofar as the national regulations were concerned, it is not apparent that at the material time there existed, apart from the FHPL, any national regulatory instruments establishing any procedures to be followed for documenting patients' consent to surgical interventions, contacting their relatives in emergency settings, or detailing, in particular, the interrelation between the notion of "consent" as stipulated in the FHPL and the "risks" to be discussed with the patients as required by the same Act in the context of ensuring that the patients' "consent" be informed.

Secondly, as regards the record-keeping practices and procedures in the hospital, where the applicant was treated, it appears that it likewise did not have in place any formalised record-keeping practices or standardised procedures for informing the patients of the foreseeable risks of planned interventions or consulting their relatives and designating contact persons in the event of an emergency. The hospital practiced taking their oral consent only, regardless of the type and seriousness of the interventions proposed.

Thirdly, it is noted that Dr I.P., appointed by the hospital as the applicant's consulting physician, was a university faculty member practising on the basis of a university-hospital partnership agreement. However, no instructions or instruments were developed defining, in any detail, the scope of his personal responsibility when imparting information to the patients consulted by him at the hospital.

The Court considers that the setting up of some standard guidelines and formalised procedures, either at the national or the local institutional level, detailing key elements of the right to informed consent, guaranteed by the FHPL, such as "the risks" to be discussed with patients and the scope of the practitioners' duty to contact their relatives or designated persons was instrumental in discharging the respondent State's positive duty to set up an appropriate regulatory framework and ensure high professional standards in this area. In the applicant's case, such guidelines and procedures would have been equally necessary for guiding her medical practitioners in their day-to-day work, for enabling the supervisory authorities to intervene promptly in the event of any omissions, and for protecting both: the applicant from malpractice and her medical team from any possibly unfounded accusations.

2. Failure to protect the applicant from concealment of the information by her physicians

The Court notes that the domestic courts found Dr I.P., the applicant's consulting physician, liable for a breach of his duties under the FHPL to inform

either the applicant, or at least her relatives, of the fact that her kidney had been removed. The applicant was awarded compensation from Dr I.P. for the distress she had suffered. The dismissal, in the civil proceedings, of some of the applicant's arguments and her claims against the hospital and other defendants does not disclose any appearance of arbitrariness or manifestly deficient approach.

The Court considers that the applicant's grievance as regards the alleged failure of the State to protect her from concealment of information by her physicians was sufficiently addressed by the domestic judicial system. A breach of her right to information concerning her health as guaranteed by the domestic law was acknowledged at the national level and she obtained reasonable compensatory redress. The present complaint must therefore be rejected as inadmissible.

For these reasons, the court, unanimously, holds that there has been a violation of Article 8 of the Convention with regard to the State's presumed failure to protect the applicant's right to informed consent to a surgical intervention; holds the remainder of the application inadmissible.

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Notes

These summaries are based on the provisional text of the judgements of the European Court of Human Rights. These judgments are still subject to editorial revision before their reproduction in *Reports of Judgments and Decisions*. For the full provisional text, see: http://www.echr.coe.int