Alexandru Voloc
Researcher, Scientific Research Department
National University «Odessa Law Academy»,
Master of Science of Law, MD, MPH

THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE DEPRIVATION OF FREEDOMS TO PREVENT THE SPREADING OF INFECTIOUS DISEASES

***А. Волок*. Практика Европейского суда по правам человека относительно ограничения свобод лиц с целью предотвращения распространения инфекционных заболеваний. –** Статья.
В статье анализируется практика Европейского суда по правам человека относительно нарушений государствами подпараграфа (e) параграфа 1 статьи 5 Европейской конвенции о защите прав человека и основных свобод о «заключении под стражу лиц с целью предотвращения распространения инфекционных заболеваний, а также законное заключение под стражу душевнобольных, алкоголиков, наркоманов или бродяг». Подчеркивается, что Судом было рассмотрено ограниченное количество дел по приведенному положению Конвенции, а в отношении неправомерного «заключения под стражу лиц с целью предотвращения распространения инфекционных заболеваний» была подана всего одна жалоба за всю историю существования ЕСПЧ, дело по рассмотрению которой, таким образом, представляет особый интерес и анализируется в статье.
Ключевые слова: Европейская конвенция о защите прав человека и основных свобод, Европейский суд по правам человека, право на свободу и личную неприкосновенность, распространение инфекционных заболеваний, заключение по стражу душевнобольных, алкоголиков, наркоманов или бродяг.

***О. Волок*. Практика Європейського суду з прав людини щодо обмеження свобод осіб з метою запобігання поширенню інфекційних захворювань. –** Стаття.
У статті аналізується практика Європейського суду з прав людини щодо порушень державами абзацу (e) параграфа 1 статті 5 Європейської конвенції про захист прав людини і основоположних свобод про «затримання осіб для запобігання поширенню інфекційних захворювань, законне затримання психічнохворих, алкоголіків або наркоманів чи бродяг». Підкреслюється, що Судом було розглянуто обмежену кількість справ за наведеним положенням Конвенції, а щодо неправомірного взяття «під варту осіб з метою запобігання по-

ширенню інфекційних захворювань» було подано всього одну скаргу за всю історію існування ЄСПЛ, справа з розгляду якій, таким чином, представляє інтерес та аналізується в статті.
Ключові слова: Європейська конвенція про захист прав людини і основоположних свобод, Європейський суд з прав людини, право на свободу та особисту недоторканність, поширення інфекційних захворювань, затримання психічнохворих, алкоголіків, наркоманів чи бродяг.

***A. Volo*c. The practice of the European Court of Human Rights on the deprivation of freedoms to prevent the spreading of infectious diseases. –** Article.
The article examines the practice of the European Court of Human Rights regarding the violations of subparagraph (e) of paragraph 1 of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, «detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.» It is emphasized that the Court has considered a limited number of cases on the given provision of the Convention, and in respect of unlawful «detention of persons for the prevention of the spreading of infectious diseases» only one application was filed throughout the history of the ECHR, the case considering it therefore being of a particular interest is analyzed in this article.
Keywords: European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights, the right to liberty and security of a person, spreading of infectious diseases, the detention of persons of unsound mind, alcoholics or drug addicts or vagrants.

The case-law of the European Court of Human Rights on the right to liberty and security (Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms) is highly extensive and has been examined by a great number of domestic and foreign scholars. However, the practice of the Court on the (e) subparagraph of the first paragraph of Article 5, namely «[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:] (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants» has been lacking academic attention [1]. As R. Martin writes, «little judicial attention has addressed the exercise

of public health powers. Indeed, the role of law in public health has been much neglected at both judicial and academic level» [2]. While the mental aspect of compulsory confinement has been addressed by the Court in 70 cases, the lawfulness of detention to prevent spreading infectious diseases has been considered by the Court in one case, *Enhorn v. Sweden* (2005) throughout the whole history of the Court's existence. The ECHR itself recognized that «the Court has only to a very limited extent decided cases where a person has been detained for the prevention of spreading infectious diseases» [3].

The case of *Enhorn v. Sweden* has therefore become of high importance as the case demonstrating the position of the Court regarding the conditions of lawful application of restriction of rights to prevent spreading infectious disease. In the case, the applicant was an HIV positive man who based on his HIV status had been kept in confinement for long stretches of time by Swedish authorities. Swedish courts had determined that he was unable to comply with measures prescribed to him aimed at preventing him from spreading the HIV infection and had ordered confinement under the Swedish Infectious Diseases Act. In total, the order to deprive him of his liberty was in force for seven years, while the time he spent in isolation amounted to one year and a half. The applicant claimed that the decision to deprive him of his liberty went contrary to his right to liberty and security under Article 5 of the Convention [4].

In the Judgment, the Court established that since there is a lack of relevant case law, «it is therefore called upon to establish which criteria are relevant when assessing whether such a detention is in compliance with the principle of proportionality and the requirement that any detention must be free from arbitrariness». By way of comparison, for the purposes of Article 5 § 1 (e), the ECHR confirmed its approach, that individual cannot be deprived of his liberty as being of unsound mind unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, pp. 17-18, § 39) [5].

In *Winterwerp v. the Netherlands*, the Court decided that the issue of what is «lawfulness» of the detention for the purposes of Article 5 para. 1 (e) had to be determined. The Court said: «Such «lawfulness»

presupposes conformity with the domestic law in the first place and also, as confirmed by Article 18 (art. 18), conformity with the purpose of the restrictions permitted by Article 5 para. 1 (e); it is required in respect of both the ordering and the execution of the measures involving deprivation of liberty… As regards the conformity with the domestic law, the Court points out that the term «lawful» covers procedural as well as substantive rules. There thus exists a certain overlapping between this term and the general requirement stated at the beginning of Article 5 para. 1, namely observance of «a procedure prescribed by law». The Court highlighted, that «these two expressions reflect the importance of the aim underlying Article 5 para. 1: in a democratic society subscribing to the rule of law, no detention that is arbitrary can ever be regarded as «lawful». Referring to the Commission's position, the Court decides that «no one may be confined as «a person of unsound mind» in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation». Hence, the Court «fully agrees with this line of reasoning. In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of «unsound mind». The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder [6].

The Court confirmed its approach in *Luberti v. Italy* (1984), where the applicant was convicted of murder and then appealed on the grounds that he was insane at the time of the commission of the killing. The appeal court ordered a psychiatric opinion from two experts who concluded that the applicant had a mental illness which deprived him of the capacity to form an intention and that at the time when the opinion was made he was, in psychiatric terms, a dangerous person. A third expert was asked to provide an opinion. This expert confirmed that the psychosis had certainly also existed at the time of the killing. The appeal court acquitted the applicant on the ground of mental disorder and directed that he should be detained for years in the psychiatric hospital of Aversa. During this detention, the applicant applied three times to be discharged. He argued a violation of the Article 5, stating that at the time the appeal court gave its judgment he was no longer suffering from a mental disorder. He maintained that the appeal court

had ordered his detention without having regard to his state of health on the date of judgment.

The Court decided that «to comply with Article 5 § 1, the confinement in question must have been effected in accordance with a procedure prescribed by law, have been lawful and have involved a person of unsound mind. It was only the last test which was, according to the applicant, not satisfied; there was no dispute as regards the other two The Court would recall that in deciding whether an individual should be detained as a person of unsound mind, the national authorities are to be recognized as having a certain margin of appreciation since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Courts task is to review under the Convention the decisions of those authorities. An individual cannot be considered to be of unsound mind for the purposes of Article 5 § 1 and deprived of his liberty unless the following three minimum conditions are satisfied: he must be reliably shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder. The Court, therefore, established, that on the basis of the evidence before it, it does not consider that it has been established that the applicants detention continued beyond the period justified by his mental disorder. There has therefore been no violation of Article 5 § 1 [7].

In *Herczegfalvy v. Austria* (1992), the European Court upheld the long-term use of physical restraints where such practice is determined to constitute «medical necessity.» Rosenthal called on the *Special Rapporteur* to repudiate the doctrine of medical necessity [8]. In 1976, when the applicant was serving a prison sentence, further criminal proceedings were brought against him for assaults on prison officers and other detainees and serious threats against judges. On completion of the original sentence on May 1977 he remained in prison and from January 1978 was detained in an institution for mentally ill offenders, for part of the time on the basis of pre-trial detention, and for part of the time as detention following a final judgment. He remained there until his conditional release on 28 November 1984. According to the Court, none of the periods of detention in issue, which had come under paragraph 1 (c) of Article 5 of the time and paragraph 1 (e) for the remaining time, had violated those provisions; the decisions of the relevant authorities had complied with the national law and had not been arbitrarily. The

Court stated, that «in order to justify detention, the fact that a person is «of unsound mind» must be established conclusively, except in case of emergency. To this end an objective medical report must demonstrate to the competent national authority the existence of a genuine mental disturbance whose nature or extent is such as to justify such deprivation of liberty, which cannot be extended unless the mental disturbance continues» [9]. However, the Court decided that there had therefore been a violation of Article 5, para 4 [10].

The Court examined the essential (practical) aspect of the lawful detention in *Aerts v. Belgium* (1998), where the applicant, who was charged with an assault causing its victim to be certified unfit for work, having attacked his ex-wife with a hammer. Later in the court he was assessed to be mentally ill. The applicant was detained for medical therapy in the psychiatric wing of a prison. He, therefore, complained that the prison was not an appropriate facility for a person with mental illness and that he did not receive regular medical attention. The Court decided that «there had been a breach of section 14 of the Social Protection Act of 1 July 1964, which provided for the detention of a mentally ill person in a prison as a provisional measure only, pending designation by the relevant mental health board of the institution where he was to be detained. His continued detention on remand had therefore no longer had any legal basis». It furthermore established 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 sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution. The Court decided that there has been a breach of Article 5 § 1[11].

Applying by comparison the basic principles of the Article 5, para. 1 (e), established in *Winterwerp* and further cases, the Court decided that the Article 5, para. 1 (e) had been violated in the abovementioned case of *Enhorn v. Sweden*. It said, that «the Article 5 § 1 (e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the

persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are a danger to public safety but also that their own interests may necessitate their detention... Taking the above principles into account, the Court finds that the essential criteria when assessing the lawfulness of the detention of a person for the prevention of the spreading of infectious diseases are whether the spreading of infectious disease is dangerous to public health or safety, and whether detention of the person infected is the last resort in order to prevent the spreading of disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest. When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist [12].

The Court, however, decided, that «it is undisputed that the first criterion was fulfilled, in that the HIV virus was and is dangerous to public health and safety… It thus remains to be examined whether the applicant's detention could be said to be the last resort in order to prevent the spreading of the virus, because less severe measures had been considered and found to be insufficient to safeguard the public interest». Referring to the Government's position, the Court stated that «the Government have not provided any examples of less severe measures which might have been considered for the applicant in the period from 16 February 1995 until 12 December 2001, but were apparently found to be insufficient to safeguard the public interest» and decided that «in these circumstances, the Court finds that the compulsory isolation of the applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had not been considered and found to be insufficient to safeguard the public interest. Moreover, the Court considers that by extending over a period of almost seven years the order for the applicant's compulsory isolation, with the result that he was placed involuntarily in a hospital for almost one and a half years in total, the authorities failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty» [13].

As stated in the Chapter 2 of the International Council on Human Rights Policy Report of 2012 on Sexual Health and Human Rights in the European Region this case has obvious connections to health and rights. First, it concerns basic rights such as liberty and self-determination when the state takes restrictive measures against an individual whose mere liberty is judged to be a danger to public health: «It also highlights

how the applicant's sexuality as such was seen as dangerous by the Swedish state. The authorities had concluded that only detention could possibly prevent this man from engaging in reckless sexual behavior and thereby spread the infection, even though very few facts about his past behavior pointed in this direction. In relation to criminalization of HIV transmission, this case is relevant in that the Court emphasized that Swedish authorities had not complied with its international human rights obligations in its combat against the virus – as strongly urged by the UNAIDS (above). The use of criminal law or, here, administrative law with coercive elements, shall be used as a last resort in measures fighting HIV. Here, coercive measures had been taken that were not deemed to be the last resort available to the authorities. The Court's decision illustrates that states cannot exclude individuals from rights protection even though they carry the HIV virus; a holding of equal significance for issues of criminalization of HIV transmission» [14].

The decision of the Court in *Enhorn v. Sweden* was based on the compliance with the case-law standards on the Article 5, para. 1 (e). However, the fact that the issue of HIV-infected persons' compulsory confinement was only once raised at the level of the European Court of Human Rights might not only prove the general satisfactory obedience of the HIV European guidelines by the States, but also by the lack of possible applicants' access to the Court. In the situation when no relevant case-law exists, an analogical application by the Court of the law, established in the cases concerning compulsory mental treatment, to the cases of prevention of infectious disease spreading has to be thoroughly considered. The main reason of the need for a careful application by comparison of the case-law standards is that the compulsory psychiatric treatment usually accompanies one's state of being not responsible, including criminally, for his/her actions; while an intentional spreading of HIV, in particular, constitutes a crime under the majority of European domestic criminal legal systems. Understanding that certain cases of detention to prevent spreading of infectious diseases may fall under the general European quarantine policies, allegations of intentional or negligent infection with the lethal disease of another person may constitute an opposite legal situation in comparison with compulsory mental treatment instead of criminal punishment. Having a different legal nature, and appropriately sharing the standards of 'lawful detention', both situations need more extensive interpretation for the relevant ECHR case-law to be properly applied.

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