

RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Introduction

1. This paper discusses 5 of the most important cases in the European Court of Human Rights (“the ECtHR”) in the last 12 months (from 1 September 2014). It also identifies some of the forthcoming cases to watch out for in the next 12 months.
2. By way of overview, the Grand Chamber of the ECtHR has heard 19 cases since 1 September 2014.¹ Only one, *Hassan v. United Kingdom* (see below), concerned the United Kingdom. The Court has heard 17 cases in which the United Kingdom was a party (including *Hassan*). The ECtHR found a violation in three cases: in *McHugh* (see below), in *Piper v. United Kingdom* [2015] ECHR 44547/10² and in *McDonnall v. United Kingdom* (2015) Times, 09 January.³

***Hassan v. United Kingdom* (2014) Times, 16 October (Grand Chamber, 16 September 2014)**

3. Issue: was the internment of the Applicant’s brother, pursuant to the Third and Fourth Geneva Conventions, consistent with Article 5 ECHR notwithstanding the lack of derogation by the UK under Article 15?
4. Factual background: on 23 April 2003 British forces arrested Tarek Hassan (“TH”), an Iraqi national, after he was found on the roof of the home of his brother (an Al-Quds General) armed with an AK-47 machine gun. TH was detained after his arrest in a British controlled

¹ The statistics for 2014 are as follows: the ECtHR dealt with 1,997 applications concerning the United Kingdom in 2014, of which 1,970 were declared inadmissible or struck out. It delivered 14 judgments (concerning 27 applications), 4 of which found at least one violation of the European Convention on Human Rights.

² The length of confiscation proceedings (some eleven years and two months) were such that the proceedings had not been completed within a reasonable time contrary to Article 6 ECHR.

³ A delay of 17 years between the death of a person in police custody and the start of an inquest into that death was a breach of the procedural aspect of Article 2 ECHR.

section of the US operated Camp Bucca in Iraq, on the grounds that he was a suspected combatant or a civilian posing a risk to national security. TH was interrogated by both UK and US soldiers. Both determined that he was a non-combatant who posed no risk to security. TH was released on in late April or early May 2003. TH's body was found on 1 September 2003: his body had bullet wounds and showed signs of having been tortured. TH's body was found some distance from Camp Bucca in an area of Iraq not controlled by British forces. The ECtHR found that there was no evidence before the Court to support the contention that TH's injuries has been sustained whilst he was in detention at Camp Bucca [57].

5. Decision on the issues: the ECtHR held, first, that the complaints under Articles 2 and 3 ECHR were manifestly ill-founded as there was no evidence to suggest that TH was ill-treated whilst in detention, such as to give rise to an obligation to carry out an investigation under Article 3 ECHR. Similarly, in the absence of any evidence of the involvement of UK state agents in the death, or even of any evidence that the death occurred within territory controlled by the UK, no obligation to investigate under Article 2 arose [63].
6. The second issue for the ECtHR concerned whether TH was in the jurisdiction of the UK within the meaning of Article 1 of the ECHR. The ECtHR rejected the UK's argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the contracting State were operating in territory of which they were not the occupying power and where the conduct of the state should instead be subject to the requirements of international humanitarian law. The argument was inconsistent with the ECtHR's decision in *Al-Skeini v. UK* (2011) 53 EHRR 589 (which was concerned with a period in which international humanitarian law was applicable, namely the period when the UK and coalition partners were in occupation of Iraq, but the ECtHR still found that the UK exercised jurisdiction under Article 1 ECHR) [76-77].
7. The third (and most interesting) issue for the ECtHR was whether TH's detention had been arbitrary, and therefore a violation of Article 5 ECHR. Article 5 contains a list of circumstances in which detention is permitted; the circumstances do not include the lawful detention of a person pursuant to powers under international humanitarian law during an international armed conflict (for example, the internment of a prisoner of war).

8. The UK Government argued that Article 5 ECHR does not apply in the active phase of an international armed conflict as international humanitarian law governs in place of the applicable ECHR norms. The UK's argument was twofold [88-89]:
 - (i) As TH was captured and initially detained as a suspected combatant, and no derogation from Article 5 was in place pursuant to Article 15, the UK argued that Article 5 ECHR was displaced by international humanitarian law as *lex specialis*.
 - (ii) Alternatively, if Article 5 did apply, the list of permissible purposes of detention contained in Article 5 had to be interpreted so that it took account of and was compatible with the relevant *lex specialis*, international humanitarian law. The taking of prisoners of war pursuant to the Third Geneva Convention and the detention of civilians pursuant to the Fourth Geneva Convention, was a lawful category of detention under Article 5 ECHR (and probably, said the UK, fell within Article 5(1)(c) ECHR).

9. The ECtHR rejected the argument that the ECHR did not apply at all [104]. The ECtHR went on to say, however, that the grounds of permissible detention in Article 5(1) implicitly included the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions [104]. The ECtHR was at pains to point out, however, that internment in peacetime does not fall within the permitted grounds of detention in Article 5(1) ECHR. It could only be in times of international armed conflict, when the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 can be interpreted as permitting the exercise of such broad powers [104].

10. The ECtHR went to emphasise that such detention must comply with the requirement in Article 5(1) to be "lawful" (and thus must comply with the requirements of international humanitarian law and must not be arbitrary) [105]. Further Articles 5(2) (right to be informed of the reasons for arrest and any charge) and Article 5(4) (right of access to a court to determine the lawfulness of the detention) apply, albeit it in a modified form. Thus although the requirement of an independent "court" might not be practicable in the context of an international armed conflict, there should be periodic review by a "competent body" which provided sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. The first review should take place shortly after a person is taken into detention, with subsequent reviews at frequent intervals to ensure that any person who does not fall

into one of the categories under international humanitarian law for internment is released without undue delay [106].

11. On the facts of the case, therefore, TH had not been unlawfully detained under Article 5 ECHR [111].
12. Why the decision is important: *Hassan* is a very important case on jurisdiction. It rejected the UK's argument that where international humanitarian law applied, the requirements of the ECHR should be displaced. But it read Article 5 ECHR very widely so as to include lawful detention under international humanitarian law despite there being no such express power in Article 5 ECHR. Query a better approach, and one that was more respectful of the ECHR, would have been to require state parties to derogate in such situations under Article 15 (an approach rejected by the ECtHR largely on the basis that States had not issued derogations in international armed conflicts, rather such derogations had been confined to additional powers of detention thought necessary due to internal conflicts or terrorist threats in the contracting State) [101].

McHugh and Ors v. United Kingdom [2015] ECHR 51987/08 (Chamber, 10 February 2015)

13. Issue: how should the ECtHR dispose of the 1,015 applications lodged against the UK by prisoners who complained of being unable to vote contrary to Article 3 of the First Protocol?
14. Factual background: in *Hirst v. UK* (2005) 42 EHRR 849 the Grand Chamber found that the UK's blanket ban on all convicted prisoners voting was disproportionate and was in breach of Article 3 of Protocol 1. In *Greens v. United Kingdom* (2010) 53 EHRR 710 the ECtHR again found a violation and stated that the UK ought to amend its electoral law within 6 months of the date of the judgment (23 November 2010) (at §115). In *Scoppola v. Italy* (2012) 33 BHRC 126 in which the UK intervened, the ECtHR upheld its decision in *Hirst*. In the wake of that decision, the ECtHR lifted the stay on the other applications pending against the UK concerning prisoner voting. More than 1000 were declared inadmissible or struck out by the Court. That left 1,025 outstanding applications by prisoners against the UK complaining that they were automatically prevented from voting in various elections, namely: to the European Parliament on 4 June 2009, to the Parliamentary election on 6 May 2010, and the elections to the Scottish Parliament, to the Welsh Assembly or Northern Irish Assembly on 5 May 2011.

15. A Joint Committee on Prisoner Voting reported in December 2013. It published a draft bill that would amend the Representation of the People Act 1983 so that prisoners who are serving a term of imprisonment of more than 12 months would be disqualified from voting in a parliamentary or local government election, but that this disqualification would cease to apply 6 months prior to the prisoner's scheduled date of release. No legislation has been forthcoming.
16. Decision on the issue: given that the legislation remained unamended, the ECtHR concluded that, as in *Hirst*, and for the same reasons, there was a breach of Article 3 of Protocol 1 [11]. The ECtHR declined to award damages on the basis that a finding of a violation constituted just satisfaction [17]. Further, the ECtHR declined to award legal costs on the basis that the legal costs claimed could not be regarded as reasonably and necessarily incurred, as the lodging of an application in repeat violation cases was straightforward and did not require legal assistance [14].
17. Why the decision is important: the judgment is the latest in the stand-off between the UK Government and the ECtHR on the subject of prisoner voting. The judgment is notable for its brevity (marking perhaps the ECtHR's exasperation with the continued failure of the UK to comply with its previous decisions). The ECtHR confines itself to noting that, once again, there has been a breach of Article 3 of Protocol 1. The situation echoes that in domestic law, with the Supreme Court concluding in *R (Chester) v. Secretary of State for Justice* [2014] AC 271 that the statutory blanket ban on prisoners voting was incompatible with Article 3 of Protocol 1, but refusing to grant a declaration of incompatibility as one had previously been granted in an earlier 2007 Scottish case. Further, the Supreme Court refused to make an award of damages. Further, it seems unlikely that *McHugh* will be the last word of the ECtHR on the subject; further claims by prisoners unable to vote in the 2015 parliamentary elections have been lodged.

Lambert v. France (2015) 38 BHRC 709 (Grand Chamber, 5 June 2015)

18. Issue: did the withdrawal of nutrition and hydration to a patient in a chronic vegetative state infringe the positive obligations under Article 2 ECHR.
19. Factual background: the applicants were the parents, a half-brother and a sister of V. V sustained serious head injuries in an accident in 2008, which left him in a chronic vegetative

state. V received artificial nutrition and hydration which was administered via a gastric tube. The relevant French legislation (“the 2005 Act”) permitted doctors, in accordance with a prescribed procedure, to discontinue treatment only if continuing it demonstrates “unreasonable obstinacy”. V’s treating physician, with the support of his wife, R, wished to discontinue nutrition and hydration. The applicants opposed this course. They pursued litigation in the French courts. The Conseil d’État concluded that the 2005 Act was not incompatible with Article 2 ECHR as the law provided for procedural safeguards (reports about the patient’s medical condition, ascertaining the patient’s wishes about being kept alive in a persistently unconscious state and consultations with the family members).

20. Decision on the issues: the first issue raised was whether the applicants had standing to bring their claim. Article 34 of the ECHR requires an applicant to be a victim of a violation of the ECHR. This requires an applicant to be able to show that he or she was “directly affected” by the measure complained of. The Court has recognised three exceptions to this principle:
- (i) Where the alleged violation or violations of the ECHR are closely connected to a death or disappearance in circumstances allegedly engaging the responsibility of the state. In such cases, the ECtHR has recognised the standing of the victim’s next of kin to submit an application in their own right.
 - (ii) The applicant has a written authority to act on the actual victim’s behalf.
 - (iii) Where the victims are vulnerable individuals, and unable to lodge a claim on their own behalf. In such cases the ECtHR has applied two criteria: the risk that otherwise the matters raised would not be brought to the attention of the ECtHR, and further, that there is no conflict of interest between the applicant and the actual victim [102].
21. Exception (ii) did not apply as the applicants had no written authority from V to act on his behalf [97]. Further, exception (iii) did not apply for two reasons:
- (i) The ECtHR did not discern any risk that V would be deprived of effective protection of his rights as it would be open to the applicants, as V’s close relatives, to bring a claim on their own behalf under Article 2 [103].
 - (ii) There was no evidence of a convergence of interests between V and the applicants: there had been evidence before the French courts that V would not, prior to this accident, to have remained alive under such conditions [104].

22. The ECtHR concluded that the applicants lacked standing to allege a violation of Articles 2, 3 and 8 of the ECHR in the name of, and on behalf of, V. The ECtHR nevertheless went on to examine the issues raised under Article 2 as they were raised by the applicants on their own behalf (criterion (i)) [112]. Further, although V was still alive, there was no doubt that if artificial hydration and nutrition was withdrawn, his death would occur within a short time. Thus, even though the violation would be a potential or future violation, the applicants, in their capacity as V's close relatives, were able to rely on Article 2 [115].
23. The ECtHR found no breach of Article 2 for the following reasons:
- (i) The 2005 Act did not authorise either euthanasia or assisted suicide. Rather, it permitted doctors to withdraw treatment [121]. Given that the 2005 Act drew a distinction between the intentional taking of life and the withdrawal of life sustaining treatment, the case did not involve the negative obligation under Article 2. Only the state's positive obligation was engaged [124].
 - (ii) It was necessary, when examining a possible violation of Article 2, to refer to Article 8 and the right to respect for private life and the notion of personal autonomy which it encompasses [142].
 - (iii) The ECtHR noted that in the two previous cases in which the question of withdrawing life sustaining treatment had been considered (*Glass v. UK* (App no 61827/00) (admissibility decision, 18 March 2003) and *Burke v. UK* (App no 19807/06) (admissibility decision, 11 July 2006), the following factors were relevant: the existence in domestic law and practice of a regulatory framework compatible with the requirements of Article 2; whether account had been taken of the applicant's previously expressed wishes and those of persons close to him, as well as the opinion of other medical personnel and the possibility to approach the courts in the event of doubts as to the best decision to take in the patient's interests [143].
 - (iv) There was no consensus amongst European states in favour of permitting the withdrawal of life-sustaining treatment, although the majority of states appeared to allow it; accordingly a wide margin of appreciation was appropriate [147-148]. It was primarily for the domestic courts to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the ECHR, and to establish the patient's wishes in accordance with national law.
 - (v) The legal framework, set out in the 2005 Act, was sufficiently clear to regulate with precision the decisions made by doctors in respect of patients such as V [160]. The

process had been consultative, and it had been lawful for the doctor to take a decision in the absence of consensus amongst family members [166-167]. The applicants had access to a court, which undertook an in-depth examination of the case, including expert evidence and observations from “the highest –ranking medical and ethical bodies” [169]. The Court had regard to evidence from R as to V’s wishes; and it was primarily for the domestic authorities to establish the patient’s wishes in accordance with national law [176-180].

(vi) The applicants’ complaint of a violation of Article 8 was absorbed by the issues raised under Article 2 [184].

24. Why the decision is important: the ECtHR asserts repeatedly that the case did not concern euthanasia or assisted suicide. Nevertheless the outcome, and the focus throughout its judgment on individual autonomy over end of life decisions (not least in the ECtHR’s emphasis on the importance of the patient’s own wishes) suggest a tentative, more permissive approach by the ECtHR to Article 2 in this context.

Delfi v. Estonia [2015] ECHR 64659/09 (Grand Chamber, 16 June 2015)

25. Issue: did Estonia infringe the Article 10 rights of the applicant company by making it liable for the comments posted by its readers on its Internet news portal?

26. Factual Background: Delfi is a public limited company registered in Estonia which owns a large Internet news site. Readers may comment on news stories, although Delfi has a policy to limit unlawful content and operates a filter as well as a notice and take down system. Delfi published on its webpage about a ferry company with the allegation that the ferry company would destroy an ice road (public roads over the frozen sea which are open between the Estonian mainland and some islands in the winter). The article attracted a number of comments, several of them contained offensive language and personal threats against L, the owner of the ferry company. L requested that the comments be deleted and damages be paid. Delfi removed the comments immediately, but refused to pay damages. L brought proceedings in the Estonia court and was successful in obtaining damages on the basis that Delfi ought to have prevented the publication of comments with clearly unlawful content,

27. Decision on the issues: the ECtHR made a number of preliminary observations:

- (i) User-generated “expressive activity” on the Internet provided an unprecedented platform for freedom of expression, but that alongside these benefits, certain dangers arose. In particular, defamatory and other types of unlawful speech, including hate speech and speech inciting violence, can be disseminated worldwide in a matter of seconds. There was therefore a need to balance Article 10 and Article 8 ECHR [110].
- (ii) Because of the particular nature of the Internet, the duties and responsibilities that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher as regards third party content [113].
- (iii) The ECtHR emphasised that the Estonian Supreme Court had concluded that the comments made about L “degraded human dignity” and were “clearly unlawful” as many of the comments were tantamount to an incitement to hatred or violence against L [114].
- (iv) The ECtHR drew a distinction between Delfi and other types of Internet fora: Delfi was a large, professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited readers to comment on them. This could be contrasted with an Internet discussion forum or a bulletin board [115-116].

28. It was not in dispute that Delfi’s freedom of expression had been interference with by the decision of the domestic court [118]. As to whether the decision was prescribed by law, Delfi argued that it could not have foreseen that the relevant Estonian law would have applied to it. The Grand Chamber reiterated (as had the Chamber) that it is not its task to interpret and apply domestic law [127]. The ECtHR stated further that “as a professional publisher, the applicant company should have been familiar with the legislation and case-law, and should also have sought legal advice” [129]. There was no dispute that the decision pursued a legitimate aim [130].

29. The ECtHR concluded that the decision of the Estonian court was proportionate:

- (i) Delfi actively sought comments on the news items appearing on the portal, and as it earned revenue from comments, had an economic interest in the posting of comments [144]. Further, Delfi exercised a substantial degree of control over the comments published on the portal [145]. It followed that Delfi’s involvement in

making public the comments on its news article went beyond that of a passive, purely technical service provider [146].

- (ii) Imposing liability on the actual authors of the comments was not a realistic alternative to imposing liability on Delfi in this case. The effectiveness of measures to allow the identity of the authors to be established was uncertain, and Delfi had not put steps in place to make it possible for a victim of hate speech to effectively bring a claim against the authors of the comments [151].
- (iii) Delfi had not taken sufficient steps to avoid these types of comments: the filter used failed to filter out the offending comments despite them being of an unsubtle nature, and as a result the offensive speech remained online for 6 weeks [156]. Notably, after this incident, Delfi set up a dedicated team of moderators [157]. The ECtHR stated that a large commercial Internet news portal had more resources than an individual victim of hate speech to monitor its site [158].
- (iv) In respect of the notice-and-take-down system, the ECtHR stated that if accompanied by effective procedures allowing for rapid response, this system could often function as an appropriate tool for balancing the rights and interests of all concerned. However, where the third party comments are in the form of hate speech and direct physical threats, the ECtHR concluded that Article 10 permitted States to impose liability on Internet news portals if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or third parties [159].
- (v) Finally, the damages awarded were not disproportionate (EUR 320 in compensation for non-pecuniary damage) [160].

30. Why the case is important: this is the first consideration of an Internet news/comment site by the Grand Chamber. Commentators have attacked the decision for being conservative, with the ECtHR's concerns about the "dangers" of the Internet colouring its approach to freedom of expression. The standard of care imposed is relatively high. The concurring opinions emphasise that the requirement on the portal to take down illegal content on its own initiative is not the same as a requirement of prior scrutiny, but plainly the ECtHR's decision now requires commercial providers at least to engage in some degree of monitoring.

Parillo v. Italy [2015] ECHR 46470/11 (Grand Chamber, 27 August 2015)

31. Issue: did the Italian law banning the donation of embryos for scientific research contravene the right to respect for private life in Article 8 and/or constitute an interference with possessions contrary to Article 1 of Protocol 1 of the ECHR?
32. Factual Background: in 2002 the applicant underwent in vitro fertilisation (“IVF”) treatment with her partner. Five embryos were created and placed in cryopreservation. Before the embryos could be implanted, the applicant’s partner died in 2003. After deciding not to have the embryos implanted, the applicant sought to donate them to be used in stem cell research. Her request was refused on the grounds that the type of research was banned and was punishable as a criminal offence in Italy.
33. Decision on the issues: the ECtHR held:
- (i) The ECtHR observed that the right to respect for private life embraced a right to self-determination (see *Pretty v. UK* (2002) 12 BHRC 149) and incorporated the right to respect for the decisions both to become, and not to become, a parent (see *Evans v. UK* (2007) EHRR 728) [153]. The applicant’s ability to exercise a conscious and considered choice regarding the fate of her embryos concerned an intimate aspect of her personal life, and related to her right of self-determination. It followed that Article 8 ECHR was engaged [159].
 - (ii) The ban constituted an interference with the applicant’s Article 8 rights [161].
 - (iii) The ECtHR acknowledged that the “protection of the embryo’s potential for life” (the legitimate aim relied on by the Italian Government) may be linked to the aim of protecting morals and the rights and freedoms of others (although the ECtHR was careful to emphasise that this did not involve any assessment of whether the word “others” in Article 8(2) extended to human embryos) [167].
 - (iv) In assessing proportionality, the ECtHR noted that the case did not concern prospective parenthood and the applicant’s right to donate embryos to scientific research was not “one of the core rights” attracting the protection of Article 8 ECHR as it does not concern a particularly important part of the applicant’s existence and identity [174]. The state was to be accorded a wide margin of appreciation [175]. The donation of embryos for scientific research raised “delicate moral and ethical questions” and there was no European consensus on the subject [176]. The legislative process leading to the Italian legislation had taken account of the views of doctors, and had held referenda: the State had therefore balanced the State’s

interest in protecting embryos with the interests of those who might wish to donate to scientific research [184-188]. Finally, the Court observed that it had no evidence as to the wishes of the applicant's partner, and whether he would have made the same choice as the applicant [196].

- (v) Italy had not, therefore, overstepped the wide margin of appreciation applicable in this case [197].
- (vi) As to Article 1 of Protocol 1, given the "economic and pecuniary scope" of Article 1 of Protocol 1, human embryos could not be regarded as "possessions" for the purposes of that Article [215].

Forthcoming Cases

34. There are three cases against the United Kingdom pending before the Grand Chamber:

- (i) *Armani da Silva v. United Kingdom*: concerns the shooting of a Brazilian national, John Charles de Menezes, wrongly identified as a suicide bomber, by the Police in the London Underground in the aftermath of the bombings in July 2005. The applicant alleges a breach of Article 2. The Chamber relinquished jurisdiction in favour of the Grand Chamber on 9 December 2014. The Grand Chamber hearing was on 10 June 2015.
- (ii) *Hutchinson v. United Kingdom*: concerns the complaint by a man serving a whole life sentence for murder that his sentence amounts to inhuman and degrading treatment as he has no hope of release. In its Chamber judgment of 3 February 2015 the Court held that there had been no violation of Article 3. The case was referred to the Grand Chamber on 1 June 2015, and the hearing will be on 21 October 2015.
- (iii) *Ibrahim and Ors v. United Kingdom*: concerns the temporary delay in providing access to a lawyer during the police questioning of the 21 July 2005 London bombers and an accomplice, and the alleged prejudice to their ensuing trials. The applicants rely on Articles 6(1) and (3)(c) (right to a fair trial and the right to legal assistance). In its Chamber judgment of 16 December 2014, the ECtHR held that there had been no violation. The case was referred to the Grand Chamber on 1 June 2015, and the hearing will be on 25 November 2015.

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Matrix

8 October 2015