

COMPENDIUM OF CASE LAW RELATED TO HIV/AIDS AND TUBERCULOSIS IN UKRAINE



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INTRODUCTION

The Compendium of case law related to HIV/AIDS and tuberculosis in Ukraine is designed to be a professional tool for minimizing human rights violations by the state against HIV-positive and people living with tuberculosis. It is intended to serve as a procedural guide for national judicial and other law enforcement agencies in the respective area, and strengthen their capacity to ensure that the rights and freedoms of those entering into legal relations, where the key aspect is the issue of HIV/AIDS and tuberculosis, are upheld.

The Compendium combines doctrine and practice, analysis of international standards, foreign legislation, national regulations, and case law (from national courts, courts in other countries, and ECtHR case law) and provides recommendations for more effective implementation of best practices in Ukrainian law enforcement, which will serve to protect human rights in the field of health care and the establishment of the rule of law. The publication aims to intensify advocacy in order to improve the national legislation in this area, as well as to help lawyers, human rights defenders, service and patient organizations, health professionals whose field of interest is HIV/AIDS, tuberculosis and human rights.

The Publication is divided into chapters that are focused on international standards including regional ones, case law and legislation from a number of foreign countries (Austria, Spain, the Netherlands, Poland, Germany, Czech Republic, Switzerland), ECtHR case law, as well as relevant national law and case law in the researched field. For the convenience of readers, each document and example of case law has a QR-code that optimizes the search for the necessary information. It should be noted that in the section containing the ECtHR case law, the *ratio decidendi* has been separated in the precedent structure to ensure the correct application thereof.

In addition, the publication includes an analysis of the domestic case law which was conducted within the framework of judgements from the Unified State Register of Court Judgements. It has been organized as follows: 1) judgements have been clustered by type of legal relations, and similar texts were not duplicated although their titles were indicated; 2) the analysis of each group of judgements or individual judgements offers practical comments and advice that can help optimize law enforcement. The Compendium contains a glossary for a better understanding of the terminology, and a list of abbreviations for ease of use. Also, it provides catalogue of essential sources to aid further research.

The analysis is followed by general conclusions on the protection of human rights, in particular in the context of the security of sensitive medical data, the impact on the legality of court proceedings, and improvement of Ukrainian legislation.

ABBREVIATIONS

AIDS	acquired immunodeficiency syndrome
ART	antiretroviral therapy
CC of Ukraine	Civil Code of Ukraine
CPC of Ukraine	Civil Procedure Code of Ukraine
CrC of Ukraine	Criminal Code of Ukraine
CrPC of Ukraine	Criminal Procedure Code of Ukraine
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
Fundamentals	Law of Ukraine “On Fundamentals of the Legislation of Ukraine on Healthcare”
HIV	human immunodeficiency virus
MOH of Ukraine	Ministry of Health of Ukraine
MTB	Mycobacterium tuberculosis
PLHIV	people living with HIV
TB	tuberculosis
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
WHO	World Health Organization

GLOSSARY OF KEY TERMS

Term	Definition	Reference
Acquired immunodeficiency syndrome (AIDS)	<p>stage of HIV-related disease (HIV infection) development, characterized by clinical manifestations caused by deep damaging of the human immune system under the influence of HIV</p> <p>labelling AIDS as deadly or incurable may create fear, and increase stigma and discrimination. Referring to it as a manageable, chronic illness also may lead people to believe that, with treatment, AIDS is not as serious as it was thought. AIDS remains a serious health condition. AIDS is not simply a case of someone suffering from immune deficiency. It is an epidemiological definition based on clinical signs and symptoms. It is caused by HIV, the human immunodeficiency virus. HIV destroys the body's ability to fight off infection and disease, which can ultimately lead to death. Antiretroviral therapy slows down replication of the virus and can greatly extend life and enhance quality of life, but it does not eliminate HIV infection</p>	<p>Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV".</p> <p>Hereinafter, "HIV Law"</p> <p>UNAIDS Terminology Guidelines, 2015</p> <p>Hereinafter, "UNAIDS, 2015"</p>
Active TB disease	<p>an illness in which TB bacteria are multiplying in different parts of the body. The symptoms of active TB disease include cough, weakness, weight loss, fever, loss of appetite and night sweats. A person with active TB disease may be infectious and spread TB to others. In the Global Plan, "people with TB" or "people ill with TB" refers to those who have active TB disease</p>	<p>The Paradigm Shift. Global Plan to End TB: 2018-2022. The Stop TB Partnership</p> <p>Hereinafter, "Paradigm Shift. Global Plan to End TB"</p>
Antibodies	<p>immunoglobulins (protein molecules) of human and animal serum that are formed (synthesized) in response to the entry into the body of various antigens that specifically interact with these antibodies</p>	<p>Andreieva et al., Glossary of terms for epidemiological surveillance in the field of HIV/AIDS. (See reference list for full details).</p> <p>Hereinafter, "Glossary"</p>

Term	Definition	Reference
Anti-epidemic regime	special anti-epidemic measures (rules of conduct for a person suffering from a contagious form of TB) established by the central executive authority, which ensures the formation and implementation of the state policy in the field of health, aimed at protecting the population, including medical and other workers, from contracting the causative agent of TB	Law of Ukraine "On Combatting Tuberculosis" Hereinafter, "TB Law"
Antiretrovirals	a class of antiviral drugs used to suppress retroviral replication (including HIV)	Glossary
Antiretroviral therapy	recommended treatment for HIV antiretroviral therapy is highly active in suppressing viral replication, reducing the amount of the virus in the blood to undetectable levels and slowing the progress of HIV disease. The usual antiretroviral therapy regimen combines three or more different medicines, such as two nucleoside reverse transcriptase inhibitors (NRTI) and a protease inhibitor, two nucleoside analogue reverse transcriptase inhibitors and a non-nucleoside reverse transcriptase inhibitor (NNRTI), or other combinations. More recently, entry inhibitors and integrase inhibitors have joined the range of treatment options. Suboptimal regimens are monotherapy and dual therapy. The term highly active antiretroviral therapy was commonly used after the demonstration of excellent virological and clinical response to combinations of three (or more) antiretroviral medicines. Highly active is not needed as a qualification, however, and the term is no longer commonly used	Glossary UNAIDS, 2015
Carrier	a person (animal) who has a certain infectious agent in the absence of obvious clinical signs of the disease and is a potential source of infection this term is no longer used because it is incorrect, stigmatizing and offensive to many people living with HIV	Glossary UNAIDS, 2015
Clinical protocol	regulatory document that defines the requirements for medical care provided to a patient with a certain disease, certain syndrome or in a certain clinical situation; contains a detailed description of the steps that must be taken in providing medical care to the patient unified document that defines the requirements for diagnostic, therapeutic, preventive methods of medical care and their sequence	Glossary Fundamentals
Close contact	a person who has had prolonged, frequent or intense contact with a person with infectious TB. This group includes people who live together or spend a great deal of time together in close proximity. Close contacts, or household contacts, are more likely to become infected with M. tuberculosis than contacts who see the person with TB less often	Paradigm Shift. Global Plan to End TB

Term	Definition	Reference
Co-infection	combined, associated, poly-, mixed infection; co-infection refers to a situation when an infectious process caused initially by one pathogen, later at different stages (or simultaneously with the beginning of the first one) may be associated with an infectious process of another aetiology	Glossary
Concordant (seroconcordant) couple	a couple where both partners are either HIV-positive or HIV-negative	Glossary
Contact	a person who has spent time with a person with infectious TB	Paradigm Shift. Global Plan to End TB
Contagiousness	ability to spread an infection	Infection control standard for health care facilities providing tuberculosis care: Order of the MOH of Ukraine No. 287, of February 1, 2019
Discrimination	<p>differences in attitudes towards people on the basis of their real or imagined belonging to a certain social group or on the basis of their inherent certain biological, physical or social characteristics</p> <p>refers to any form of arbitrary distinction, exclusion or restriction affecting a person, usually (but not only) because of an inherent personal characteristic or perceived membership of a particular group. It is a human rights violation. In the case of HIV, this can be a person's confirmed or suspected HIV-positive status, irrespective of whether or not there is any justification for these measures</p>	<p>Glossary</p> <p>UNAIDS, 2015</p>
Drug resistant TB	disease caused by a strain of TB bacteria that is resistant to the most commonly used anti-TB drugs	Paradigm Shift. Global Plan to End TB
Elimination	reduction of the level of circulation of the pathogen among the population or a separate group to the level of indicators defined by the WHO	On approval of the State Strategy for control of HIV/AIDS, Tuberculosis and viral hepatitis for the period up to 2030: Cabinet of Ministers of Ukraine Ordinance No. 1415-p, of November 27, 2019
Exposed person	a person who is and/or has been in contact with a person or animal suffering from a contagious form of TB and, as a result, is at risk of contracting TB	TB Law
Extensive drug-resistance TB	occurs when the bacteria causing tuberculosis are resistant to isoniazid, rifampicin, fluoroquinolones and at least one injectable second-line drug. The emergence of XDR-TB underlines the necessity of managing tuberculosis programmes in a systematic way at all levels	UNAIDS, 2015

Term	Definition	Reference
	disease caused by a strain of TB bacteria that is resistant to isoniazid and rifampicin (the two most commonly used anti-TB drugs), as well as a fluoroquinolone and at least one of the three injectable second-line drugs (amikacin, kanamycin, capreomycin)	Paradigm Shift. Global Plan to End TB
Gender	<p>a social sex, determining a person's behaviour in society and how this behaviour is perceived</p> <p>"refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies, there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities</p>	Glossary UNAIDS, 2015
Gender identity	refers to a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. It includes both the personal sense of the body – which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means – as well as other expressions of gender, including dress, speech and mannerisms	UNAIDS, 2015
Genotype	the genetic constitution, i.e. a set of all the genes of the body	Glossary
Groups at high risk of HIV infection	<p>population groups who are at a high risk of contact with a person who is HIV positive, due to their behaviour and the behaviour of their inner circles. The list of such groups is defined and revised by the central executive authority, which ensures the formulation of the state policy in the field of health care, taking into account the criteria and recommendations of the WHO</p> <p>such terms should be used with caution as they can increase stigma and discrimination. They may also lull people who don't identify with such groups into a false sense of security. "High-risk group" also implies that the risk is contained within the group whereas, in fact, all social groups are interrelated. It is often more accurate to refer directly to "higher risk of HIV exposure", "sex without a condom", "unprotected sex", or "using non-sterile injection equipment" rather than to generalize by saying "high-risk group".</p>	HIV Law UNAIDS' Terminology Guidelines, 2007 Hereinafter, "UNAIDS, 2007"

Term	Definition	Reference
	<p>Membership of groups does not place individuals at risk, behaviours may. In the case of married and cohabiting people, particularly women, it may be the risk behaviour of the sexual partner that places them in a “situation of risk”. There is a strong link between various kinds of mobility and heightened risk of HIV exposure, depending on the reason for mobility and the extent to which people are removed from their social context and norms</p> <p>these terms should be avoided because they imply that the risk is contained within the group, whereas all social groups actually are interrelated. The use of the term high-risk group may create a false sense of security in people who have risk behaviours but do not identify with such groups, and it can also increase stigma and discrimination against the designated groups. Membership of groups does not place individuals at risk; behaviours may. In the case of married and cohabiting people, particularly women, the risk behaviour of the sexual partner may place the partner, who is not engaged in risk behaviour, in a situation of risk</p>	UNAIDS, 2015
Health	a state of complete physical, mental and social well-being and not merely the absence of a disease or infirmity	Fundamentals
Health care	system of measures carried out by governmental authorities and local self-governing bodies, their officials, health care facilities, individual entrepreneurs who are registered in the manner prescribed by law and have received a licence to practice medicine, medical and pharmaceutical workers, public associations and citizens in order to preserve and restore physiological and psychological functions, optimal performance and social activity of a human with the maximum biologically possible individual life expectancy	Fundamentals
Health care facility	a legal entity of whatever form of ownership and legal form or incorporation or a standalone unit thereof, which provides medical care to the population on the basis of the relevant licence and professional activity of medical (pharmaceutical) workers	Fundamentals
HIV	<p>human immunodeficiency virus, which causes the HIV-infection disease</p> <p>the virus that weakens the immune system, ultimately leading to AIDS</p>	<p>HIV Law</p> <p>UNAIDS, 2015</p>

Term	Definition	Reference
HIV-1	the retrovirus isolated and recognized as the etiologic (i.e. causing or contributing to the cause of a disease) agent of AIDS. HIV-1 is classified as a lentivirus in a subgroup of retroviruses. Most viruses (and all bacteria, plants and animals) have genetic codes made up of DNA, which is transcribed into RNA to build specific proteins. The genetic material of a retrovirus such as HIV is the RNA itself. The viral RNA is reverse transcribed into DNA, which is then inserted into the host cell's DNA, preventing the host cell from carrying out its natural functions, instead turning it into an HIV factory	UNAIDS, 2015
HIV-2	virus closely related to HIV-1 that also has been found to cause AIDS. It was first isolated in West Africa. Although HIV-1 and HIV-2 are similar in their viral structure, modes of transmission and resulting opportunistic infections, they have differed in their geographical patterns of infection and their propensity to progress to illness and death. Compared with HIV-1, HIV-2 is found primarily in West Africa and has a slower, less severe clinical course	UNAIDS, 2015
HIV-infected person	<p>a person who has been found to be infected with HIV, but who is asymptomatic</p> <p>as distinct from HIV-positive (which can sometimes be a false positive test result, especially in infants of up to 18 months of age), the term HIV-infected is usually used to indicate that evidence of HIV has been found via a blood or tissue test</p> <p>a term not recommended by UNAIDS. "HIV-positive person" or "person living with HIV" are preferable, instead</p>	<p>HIV Law</p> <p>UNAIDS, 2007</p> <p>UNAIDS, 2015</p>
HIV-negative	a person who is HIV-negative (also known as seronegative) shows no evidence of HIV in a blood test (e.g. there is an absence of antibodies against HIV). The test result of a person who has acquired HIV but is in the window period between HIV exposure and detection of antibodies also will be negative	UNAIDS, 2015
HIV-positive	a person who is HIV-positive (or seropositive) has had antibodies against HIV detected in a blood test or gingival exudate test (commonly known as a saliva test). Results may occasionally be false-positive, especially in infants up to 18 months of age who are carrying maternal antibodies	UNAIDS, 2015
HIV-related diseases (HIV-infection)	a set of diseases of the human body caused by HIV-related damage to the immune system, as defined by the International Classification of Diseases, which at the initial stage of its development has the character of an asymptomatic HIV carrier, and in the absence of appropriate treatment and exposure to other adverse circumstances acquires clinical manifestations in the form of various infectious, parasitic diseases, malignant tumours, other diseases or HIV-induced acquired immunodeficiency syndrome	HIV Law

Term	Definition	Reference
HIV-status (serostatus)	<p>condition of a person's body in terms of the absence or presence of HIV therein: a person's negative HIV status is characterized by the absence of HIV in the body, a person's positive HIV status is characterized by the presence of HIV in the body</p> <p>a generic term that refers to the presence/absence of antibodies in the blood. Often, the term refers to HIV antibody status</p>	<p>HIV Law</p> <p>UNAIDS, 2007</p>
Hospitalization	<p>admission of a person with TB or a person suspected of having TB in an inpatient department of an anti-TB facility for the purpose of diagnosing, treating or isolating</p>	<p>TB Law</p>
Immunodeficiency	<p>inability of the immune system to produce a sufficient response to the antigen: an impairment of immunological responsiveness associated with the loss of one or more elements of the immune system or non-specific protective factors that interact closely with them (e.g., complement system, phagocytic macrophages)</p>	<p>Glossary</p>
Infection control of TB	<p>the system of organizational, anti-epidemic and preventive actions established by the central executive authority which ensures the formulation and implementation of the state policy in the field of health care in the standard of infectious control of TB, aimed at the prevention of emergence of TB and decrease in probability of infection with Mycobacterium TB of persons in treatment and prevention facilities, places of long-term stay of people and accommodation of TB patients</p>	<p>TB Law</p>
Isolation	<p>separation of a person suffering from a contagious form of TB from others, in order to prevent the transmission of infection to others, provision of medical care and monitoring of compliance with the anti-epidemic regime by this person</p>	<p>TB Law</p>
Key populations	<p>UNAIDS considers gay men and other men who have sex with men, sex workers and their clients, transgender people, people who inject drugs and prisoners and other incarcerated people as the main key population groups. These populations often suffer from punitive laws or stigmatizing policies, and they are among the most likely to be exposed to HIV. Their engagement is critical to a successful HIV response everywhere – they are key to the epidemic and key to the response. Countries should define the specific populations that are key to their epidemic and response based on the epidemiological and social context. The term key populations at higher risk also may be used more broadly, referring to additional populations that are most at risk of acquiring or transmitting HIV, regardless of the legal and policy environment.</p>	<p>UNAIDS, 2015</p>

Term	Definition	Reference
Latency	describes a virus that exists inside a body in an inactive or resting (latent) state. Latent viruses do not produce more viruses, and they can exist in cellular pools, often referred to as reservoirs, in a person's body, not causing any observable symptoms for a considerable period of time before re-awakening and becoming active again. HIV is capable of latency, as seen in the reservoirs of latently HIV-infected cells that persist despite antiretroviral therapy. It is because of this HIV persistence that antiretroviral therapy must to be taken for life	UNAIDS, 2015
Medical care	activities of professionally trained medical workers aimed at prevention, diagnosis, treatment and rehabilitation in connection with diseases, injuries, poisonings and pathological conditions, as well as in connection with pregnancy and childbirth	Fundamentals
Mother-to-child transmission of HIV (vertical transmission of HIV)	<p>one of the established and precaution ways of infection with the pathogen, which can be transmitted during pregnancy, childbirth and breastfeeding of children born to HIV-infected mothers</p> <p>some countries prefer the term "parent-to-child transmission" to avoid stigmatising pregnant women and to encourage male involvement in HIV prevention</p>	<p>Unified Guidelines for primary, secondary (specialized) and tertiary (highly specialized) medical care "Prevention of HIV transmission from mother to child": the MOH of Ukraine Order No. 449, of May 16, 2016</p> <p>UNAIDS, 2007</p>
Multidrug-resistant TB	<p>a specific form of drug-resistant tuberculosis, caused by a bacillus that is resistant to at least isoniazid and rifampicin, the two drugs that form the backbone of standard antituberculosis treatment</p> <p>disease caused by a strain of TB bacteria that is resistant to at least isoniazid and rifampicin (the two most commonly used anti-TB drugs)</p>	<p>UNAIDS, 2015</p> <p>Paradigm Shift. Global Plan to End TB</p>
Opioid substitution therapy	<p>recommended form of treatment for opioid-addicted people</p> <p>the recommended form of drug dependence treatment for people who are dependent on opioids. It has proved to be effective in the treatment of opioid dependence, in the prevention of HIV transmission and in the improvement of adherence to antiretroviral therapy</p>	<p>Glossary</p> <p>UNAIDS, 2015</p>
Opportunistic infection	infections caused by various organisms, many of which usually do not cause disease in persons with healthy immune systems. Persons living with advanced HIV infection may have opportunistic infections of the lungs, brain, eyes and other organs	UNAIDS, 2015

Term	Definition	Reference
Palliative care	an approach that improves the quality of life of patients and their families facing life-threatening illness, through the prevention and relief of suffering by means of early identification, impeccable assessment and treatment of pain and other physical symptoms, as well as the provision of psychosocial and mental support	Infection control standard for health care facilities providing tuberculosis care: the MOH of Ukraine Order No. 287, of February 1, 2019
Partner	sexual partner of an HIV-infected person or his/her partner for injecting drugs and psychotropic substances	HIV Law
Patient	an individual who has sought medical care and/or who is provided with such care the term patient can only be used when referring to a clinical setting. Preferred: patient with HIV-related illness	Fundamentals UNAIDS, 2007
Patient with a contagious form of TB	a patient with TB, in whose sputum Mycobacteria TB are found, who is a source of infection for persons who come into contact with him/her	TB Law
Patient with TB in remission	a patient with TB with inactive residual manifestations of the disease, who does not pose a risk of infection for exposed persons, but needs medical (dispensary) observation	TB Law
People affected by TB	this term encompasses people ill with TB and their family members, dependents, communities and health care workers who may be involved in caregiving or are otherwise affected by the illness	Paradigm Shift. Global Plan to End TB
People living with HIV	HIV-infected persons and persons suffering from a HIV-related disease	HIV Law
People with TB	this term encompasses people who are ill with active TB. The term "people (or person) with TB" recognizes that people with TB should not be defined solely by their condition. The term may be preferable to the word "patient" in certain contexts (e.g., non-medical and community settings)	Paradigm Shift. Global Plan to End TB
Person infected with Mycobacterium TB	a person who, in the absence of clinical manifestations of the disease, has a positive immune response to tuberculin or antibodies to Mycobacterium TB	TB Law
Person suffering from an HIV-related disease	a person who, as a result of a medical and laboratory examination, has been diagnosed with AIDS or other clinical manifestations of a HIV-related disease established by the International Classification of Diseases	HIV Law

Term	Definition	Reference
Post-exposure prophylaxis	<p>a short-term course of antiretroviral treatment aimed at reducing the likelihood of HIV infection in a person after high-risk exposure to such infection</p> <p>refers to antiretroviral medicines that are taken after exposure (or possible exposure) to HIV. The exposure may be occupational (e.g. a needlestick injury) or non-occupational (e.g. condomless sex with a seropositive partner). The latter is sometimes referred to as non-occupational post-exposure prophylaxis (N-PEP)</p>	<p>HIV Law</p> <p>UNAIDS, 2015</p>
Pre-exposure prophylaxis	<p>refers to antiretroviral medicines prescribed before exposure (or possible exposure) to HIV. Several studies have demonstrated that a daily oral dose of appropriate antiretroviral medicines is effective in both men and women for reducing the risk of acquiring HIV infection through sexual or injection transmission</p>	<p>UNAIDS, 2015</p>
Prevalence	<p>usually given as a percentage, HIV prevalence quantifies the proportion of individuals in a population who are living with HIV at a specific point in time. HIV prevalence also can refer to the number of people living with HIV</p>	<p>UNAIDS, 2015</p>
Remission	<p>stage of the disease in which there is a decrease (weakening) of symptoms</p>	<p>Glossary</p>
Resistance	<p>resistance of microorganisms to therapeutic drugs (as well as to disinfectants)</p>	<p>Glossary</p>
Sanitary and epidemic welfare of the population	<p>the state of health of the population and human living environment, in which the incidence rates are at a steady level for the given area, living conditions are favorable for the population, and the parameters of environmental factors are within the limits set by sanitary norms</p>	<p>Law of Ukraine "On Ensuring Sanitary and Epidemiological Welfare of the Population"</p>
Second generation surveillance	<p>the regular and systematic collection, analysis, interpretation, reporting and use of information to track and describe changes in the HIV epidemic over time. In addition to HIV surveillance and AIDS case reporting, second generation surveillance includes behavioral surveillance to track trends in risk behaviors over time in order to identify or explain changes in levels of infection and the monitoring of sexually transmissible infections in populations at risk of acquiring HIV. These different components achieve greater or lesser significance depending on the surveillance needs of a country, as determined by the nature of the epidemic it is facing</p>	<p>UNAIDS, 2015</p>
Standard precautions	<p>standard infection control practices – including the use of gloves, barrier clothing, masks and goggles (when anticipating splatter) – to be used universally in health-care settings in order to minimize the risk of exposure to pathogens found in tissue, blood and body fluids</p>	<p>UNAIDS, 2015</p>

Term	Definition	Reference
Stigma	<p>simplistic, stereotypical opinion about a particular social group or its representatives; perception of a person or social group through the prism of preconceived notions (stereotypes) constructed by society, which consist in the spread (transfer) of real or imaginary qualities of such a social group to each of its representatives; attribution to an individual as a real or imaginary member of a certain group of socially negative traits, characteristics that are perceived as shameful, humiliating</p> <p>is derived from a Greek word meaning a mark or stain, and it refers to beliefs and/or attitudes. Stigma can be described as a dynamic process of devaluation that significantly discredits an individual in the eyes of others, such as when certain attributes are seized upon within particular cultures or settings and defined as discreditable or unworthy. When stigma is acted upon, the result is discrimination</p> <p>is derived from the Greek meaning “a mark or a stain”. Stigma can be described as a dynamic process of devaluation that significantly discredits an individual in the eyes of others. Within particular cultures or settings, certain attributes are seized upon and defined by others as discreditable or unworthy. When stigma is acted upon, the result is discrimination that may take the form of actions or omissions</p>	<p>Glossary</p> <p>UNAIDS, 2015</p> <p>Paradigm Shift. Global Plan to End TB</p>
Strategic use of antiretrovirals	<p>A collective term that refers to the different strategies for using antiretroviral medicines for HIV prevention and treatment. These include the following: antiretroviral medicines given to treat HIV-positive individuals in order to reduce HIV-related morbidity and mortality (antiretroviral therapy); antiretroviral medicine prophylaxis for pregnant women living with HIV to prevent HIV transmission to their infants (PMTCT); antiretroviral medicines given to HIV-positive individuals in order to prevent HIV transmission (e.g. in serodiscordant relationships); and antiretroviral medicines given to HIV-negative individuals in order to prevent HIV acquisition. The use of topical antiretrovirals to prevent HIV acquisition is still being researched, and it is not generally included within the term strategic use of antiretrovirals</p>	<p>UNAIDS, 2007</p>
Surveillance	<p>the continuous systematic collection, analysis and interpretation of health-related data that are needed for the planning, implementation and evaluation of public health practice</p>	<p>UNAIDS, 2015</p>

Term	Definition	Reference
TB	<p>socially dangerous infectious disease caused by Mycobacterium TB</p> <p>the leading HIV-associated opportunistic infection in low- and middle- income countries, and it is a leading cause of death globally among people living with HIV. The term HIV-associated tuberculosis or HIV-associated TB should be used, rather than the shorthand HIV/TB, in order to distinguish such instances from tuberculosis per se. The main strategies to reduce the burden of HIV in TB patients are HIV testing (for people whose HIV status is unknown) and the provision of antiretroviral therapy and cotrimoxazole preventive therapy (CPT) (for people living with HIV). The main activities to reduce TB among people living with HIV are regular screening for TB among people in HIV care and the provision of isoniazid preventive therapy (IPT) and ART to HIV-positive people without active TB who meet eligibility criteria</p>	<p>TB Law</p> <p>UNAIDS, 2015</p>
TB diagnosis	<p>diagnostic test conducted for the timely detection of persons infected with Mycobacterium TB and TB patients, by specially trained medical staff in the manner prescribed by the central executive authority, which ensures the formulation and implementation of the state policy in the field of health</p>	<p>TB Law</p>
TB disease	<p>an illness in which TB bacteria multiply and attack a part of the body, usually the lungs. The symptoms of active TB disease include weakness, weight loss, fever, loss of appetite and night sweats. Other symptoms of TB disease depend on where in the body the bacteria are growing. If TB disease is in the lungs (pulmonary TB), the symptoms may include a bad cough, pain in the chest and coughing up blood. A person with pulmonary TB disease may be infectious and spread TB bacteria to others</p>	<p>Paradigm Shift. Global Plan to End TB</p>
TB facilities	<p>medical and preventive health care facilities (anti-TB dispensaries, hospitals, sanatoriums, other facilities) or their structural units, in which medical care is provided to patients with TB. The list of anti-TB facilities is approved by the central executive authority, which ensures the formulation and implementation of the state policy in the field of health care</p>	<p>TB Law</p>
TB infection	<p>also called latent TB infection. It is a condition in which TB bacteria are alive but inactive in the body. People with TB infection have no symptoms; they do not feel sick, cannot spread TB bacteria to others, and usually test positive for infection – positive to a tuberculin skin test or a special test called IGRA (interferon gamma release assay). In the Global Plan, people referred to as “infected with TB” are people having such latent TB infection</p>	<p>Paradigm Shift. Global Plan to End TB</p>

Term	Definition	Reference
TB preventive measures	a set of socio-economic, organizational, treatment and prevention, sanitary and hygienic and anti-epidemic measures to protect the population from TB, aimed at preventing, detecting, diagnosing, treating and rehabilitating TB patients	TB Law
Viral load	a measure of the number of viral particles in a certain volume of biological fluid; virus concentration in the biological substrate, which is measured by the number of virus copies per milliliter (for example, the number of RNA copies in a milliliter of blood/plasma)	Glossary
Virulence	the sum of properties of the infectious agent that determine its ill effects; virulence differs from pathogenicity	Glossary
Virus	non-cellular forms of life of a simple organization that have a genome (DNA or RNA, respectively DNA or RNA viruses, according to the Baltimore classification), externally surrounded by protein molecules that form the envelope of the virus (capsid)	Glossary
Vulnerability	refers to unequal opportunities, social exclusion, unemployment or precarious employment (and other social, cultural, political, legal and economic factors) that make a person more susceptible to HIV infection and developing AIDS. The factors underlying vulnerability may reduce the ability of individuals and communities to avoid HIV risk, and they may be outside of their control. These factors may include: lack of the knowledge and skills required to protect oneself and others; limited accessibility, quality and coverage of services; and restrictive societal factors, such as human rights violations, punitive laws or harmful social and cultural norms (including practices, beliefs and laws that stigmatize and disempower certain populations). These factors, alone or in combination, may create or exacerbate individual and collective vulnerability to HIV	UNAIDS, 2007



INTERNATIONAL STANDARDS

The Association Agreement between the European Union and the European Atomic Energy Community and their Member-States of the one part, and Ukraine, of the other part (hereinafter, the Association Agreement) enshrined the vector chosen by Ukraine for integration into the European Union, including that in the field of public health. Chapter 22 on “Public Health” of the Association Agreement states that the Parties shall develop their cooperation in the field of public health, to raise the level of public health safety and protection of human health as a precondition for sustainable development and economic growth. According to Art. 427 of the Association Agreement, one of the areas of cooperation is the prevention and control of communicable diseases, such as HIV/AIDS and TB (item (b) part 1).

International treaties occupy an important place in the system of international standards for legal regulation of relations. Pursuant to part 1 of Art. 2 of the Law of Ukraine “On International Treaties of Ukraine”, an international treaty of Ukraine is an agreement concluded in writing with a foreign state or other entity under international law, which is regulated by international law, regardless of whether the treaty is contained in one or more related documents, and regardless of its specific name (contract, agreement, convention, pact, protocol, etc.). Art. 10 of the CC of Ukraine provides for the general rule of international treaties application in the civil legal relations regulation. According to this article, if the Verkhovna Rada of Ukraine has given consent to be bound by an international treaty governing civil relations, the treaty is recognized as part of national civil legislation of Ukraine. If an international treaty of Ukraine, concluded in the manner prescribed by law, contains rules other than those established by the relevant act of civil legislation, the rules of the relevant international treaty of Ukraine shall apply.

The book covers both acts of binding nature (“hard law”) and international acts of recommendatory nature: “soft law” together with the documents of international non-governmental organizations. Unlike “soft law” acts, which are formed by international intergovernmental agencies and organizations, the latter are created and implemented by international, usually professional, non-governmental organizations.

The role and importance of soft law acts and documents of international non-governmental organizations is significant, given that “hard law”, which is contained in international treaties, does not always meet the real needs of the research areas in a timely and complete manner. At the same time, as a result of the work of international governmental institutions, soft law acts and documents of international non-governmental organizations are more dynamic and can respond effectively and in a timely manner to human rights issues.

General international standards and recommendations



*Universal Declaration of Human Rights (1948)*¹

The Universal Declaration of Human Rights, which is the main constituent document of the UN, was adopted by the UN General Assembly on December 10, 1948. In 1968, the United Nations International Conference on Human Rights declared that the Declaration “is an obligation for members of the international community” for all people. The Declaration formed the basis for two binding UN human rights pacts: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The preamble to the Universal

Declaration of Human Rights proclaims the belief in fundamental human rights, in the dignity and worth of the human being. The right to health care is not directly enshrined in this document, therefore, it can be defined as derived from other rights contained in this act. Indirectly, the regulation of health care is found through the regulation of Art. 3 of the Declaration, which constitutes the right of everyone to life and Art. 5 of the Declaration on the Prohibition of Torture and Inhuman or Degrading Treatment or Punishment. Art. 25 of the Universal Declaration states: “Everyone has the right to a standard of living, including food, clothing, housing, medical care and necessary social services, which is necessary to maintain the health and well-being of himself and of his family.”



*Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14 (1950)*²

Adopted after the Universal Declaration of Human Rights, this ECHR was intended to be an instrument that could effectively protect the basic catalogue of human rights in European countries. Ukraine ratified it on July 17, 1997. Although the Convention for the Protection of Human Rights and Fundamental Freedoms does not contain rules on the rights of people living with HIV, the ECtHR, as the only body empowered to interpret its general provisions, considers allegations of violations

on the basis of the relevant articles, depending on the nature of such a violation. This Convention will be discussed in more detail in the section “European Court of Human Rights case law”.



*International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly resolution 2200A (XXI) (1966)*³

The International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly on December 16, 1966, and Ukraine ratified the Covenant on October 19, 1973. Among other inalienable rights, Art. 12 of the Covenant enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights develops general comments in which the provisions of the Covenant are to be interpreted.

¹ URL: https://zakon.rada.gov.ua/laws/show/995_015#Text

² URL: <https://rm.coe.int/1680063765>

³ URL: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>



International Covenant on Civil and Political Rights adopted by the UN General Assembly (1966)⁴

The International Covenant on Civil and Political Rights was adopted by the UN General Assembly on December 16, 1966, and Ukraine ratified the Covenant on October 19, 1973. The implementation of the Covenant is monitored by the UN Human Rights Committee, which considers reports from States Parties, publishes comments (“general comments”) on the Covenant and reviews complaints of violations of the Covenant by States Parties to the First Optional Protocol. Among the rights guaranteed is the right to life (art. 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7).



European Social Charter (1966, revised)⁵

The Charter was adopted on October 18, 1961, revised on May 3, 1996, and ratified by Ukraine on September 14, 2006. It is the only document that fully guarantees basic social and economic rights.

Art. 11 (the right to health care) and 13 (the right to social and medical assistance) of the Charter are directly devoted to the rights in the field of health care, (the Charter has been ratified with reservations, Article 13 of the Charter has been restricted). In order to ensure the effective implementation of the right to health care, states are obliged to take measures aimed at Art. 11 of the Charter, on: 1) elimination, if possible, of the causes of diseases; 2) creation of consultative and educational institutions aimed at promoting the health of the population and approving the individual responsibility of people for their health; 3) prevention, if possible, of epidemics, other diseases, as well as accidents.

The European Committee of Social Rights shall analyze the appropriateness of the measures taken by each State-Party to comply with this Article. In particular, when the Committee assesses the compliance of measures taken by states with the requirements of para. 1 of Art. 11 of the Charter, take into account such aspects as: actions aimed at providing medical and paramedical services at the appropriate level; actions related to environmental protection and those that ensure food safety, reduce air, water pollution, etc.; actions aimed at treating certain diseases, including AIDS, diseases related to smoking, drug addiction, alcoholism, as well as taking into account information on the number of medical institutions, the number of employees in sanitary services, etc.

Art. 13 of the European Social Charter, in order to ensure the effective exercise of the right to social and medical assistance, obliges States-Parties to: 1) create conditions so that every person who finds him/herself without adequate resources and is unable to acquire such resources through his/her own efforts or from other sources, in particular, from social security funds, could receive the necessary assistance in case of illness; 2) ensure that such assistance does not lead to a reduction in the political and social rights of the recipients; 3) provide that everyone can obtain, through appropriate public and private services, the appropriate advice and personal assistance necessary to avoid, eliminate or alleviate personal or family needs.

⁴ URL: https://zakon.rada.gov.ua/laws/show/995_043

⁵ URL: https://zakon.rada.gov.ua/laws/show/994_062#Text



UN Convention on the Elimination of All Forms of Discrimination against Women (1979)⁶

The Convention was adopted by the UN General Assembly on December 18, 1979, and ratified by Ukraine on December 19, 1980. Described as an international “Bill of rights” for women. In particular, Art. 12 prohibits discrimination against women in health care; in Art. 14: the right of women living in rural areas to access appropriate health care. The Committee on the Elimination of Discrimination against Women monitors the implementation of the Convention.



UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)⁷

The Convention was adopted on December 10, 1984, and ratified by Ukraine on January 26, 1987. The Convention prohibits torture under all circumstances, prohibits the extradition of persons to countries where there is a serious threat of torture, and establishes the obligation to prosecute torture. The implementation of the Convention is monitored by the UN Committee on Torture.



UN Convention on the Rights of Child (1989)⁸

The Convention is the first and main binding international legal document establishing the catalogue of the rights of the child, adopted by UN General Assembly Resolution 44/25 of November 20, 1989, and ratified by Ukraine on February 27, 1991. The implementation of the Convention is monitored by the UN Committee on the Rights of the Child.

This international document in Art. 24 enshrines the right of the child to the enjoyment of the highest attainable standard of health and to medical treatment, and rehabilitation. In addition, the article provides for measures to be taken by States-Parties to fully exercise this right, in particular: 1) to reduce infant and child mortality; 2) ensure the provision of necessary medical care and health care for all children, giving priority to the development of primary health care; 3) fight diseases and malnutrition, including in the framework of primary health care; 4) provide mothers with appropriate health care services in the prenatal and postpartum periods; 5) provide knowledge of all segments of society, including parents and children, about the health and nutrition of children, the benefits of breastfeeding infants on the basics of hygiene, sanitation of the environment of the child; on accident prevention, as well as access to education and their support in the use of this knowledge; 6) to develop educational work and services in the field of preventive medical care and family size planning.

⁶ URL: https://zakon.rada.gov.ua/laws/show/995_207#Text

⁷ URL: https://zakon.rada.gov.ua/laws/show/995_085#Text

⁸ URL: https://zakon.rada.gov.ua/laws/show/995_021#Text



Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997)⁹

The Convention was adopted by the CoE on April 4, 1997, signed by Ukraine on March 22, 2002, but not ratified. Art. 3 of the Convention on Human Rights and Biomedicine guarantees everyone equal access to health care, which means that States-Parties that have ratified the Convention take appropriate measures to ensure equal access to health care of adequate quality within their jurisdiction. In

addition, the Convention stipulates that any intervention in the field of health may be carried out only with the voluntary and informed consent of the person. Such a person shall be provided in advance with relevant information on the purpose and nature of the intervention, as well as its consequences and risks.



General Comment No. 14 (2000) Substantive issues, arising in the implementation of International Covenant on Economic, Social and Cultural Rights: The Right to Highest Attainable Standard of Health¹⁰

The said Comment states that since the adoption of both International Covenants in 1966, the health situation in the world has changed dramatically, in particular, previously unknown diseases such as HIV, AIDS and others, which have become more widespread, as well as cancer, together with the rapid growth of the world population, have created new obstacles to the realization of the right to health

care, which must be taken into account when interpreting Art. 12 of the International Covenant on Economic, Social and Cultural Rights. In this regard, special attention shall be paid to the availability of the right to health care, and in particular to its physical accessibility. Thus, health care facilities, goods and services must be physically accessible to all segments of the population, especially vulnerable or marginalized groups such as ethnic minorities and indigenous peoples, women, children, adolescents, the elderly, persons with disabilities and persons living with HIV/AIDS.

It is also emphasized that the prevention, treatment and control of epidemic, endemic, occupational and other diseases requires, in particular, the creation of preventive and educational programs on behavioral issues related to health problems, such as sexually transmitted diseases, HIV/AIDS, etc., which adversely affect sexual and reproductive health; and promoting the social determinants of good health, such as environmental security, education, economic development and gender equality. Disease control refers to individual and joint efforts of states, in particular to provide appropriate technologies, use and improve epidemiological surveillance and data collection on a disaggregated basis, implement or improve immunization programs and other strategies to control infectious diseases.

The Covenant prohibits any discrimination in access to health care and the main determinants of health, as well as in the means and rights to acquire them on the basis of, *inter alia*, health (including HIV/AIDS), if it has the purpose or effect of nullifying or impairing the equal use or exercise of the right to health. The relevant Committee emphasizes that many measures, such as most strategies and programs aimed at eliminating discrimination related to health, can be carried out with minimal resources by adopting, modifying or repealing legislation or disseminating information. Even in times of severe resource constraints, vulnerable members of society must be protected by adopting relatively inexpensive targeted programs.

⁹ URL: https://zakon.rada.gov.ua/laws/show/994_334#Text

¹⁰ URL: <https://cutt.ly/Qjp6SqP>

Public health protection is used by states as a basis for certain restrictions on other rights. Each State Party that, for example, restricts the movement or imprisonment of persons with infectious diseases such as HIV/AIDS, deny doctors the treatment of persons considered to be in opposition to the authorities or not provide immunization against major infectious diseases, on such grounds as national security or the maintenance of public order, bears the burden of justifying such serious measures of compliance, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interests of legitimate and strictly necessary purposes. to promote the common good in a democratic society.

The responsibilities of States Parties include the provision of public, private or mixed health insurance systems that are accessible to all, the promotion of medical research and medical education, and information campaigns, in particular on HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, abuse of alcohol and tobacco, drugs and other harmful substances.



*Convention on the Rights of Persons with Disabilities (2006)*¹¹

The Convention was adopted by the UN General Assembly on December 13, 2006, and ratified by Ukraine on December 16, 2009. The implementation of the Convention is monitored by the UN Committee on the Rights of Persons with Disabilities. It is a UN international treaty on human rights aimed at protecting the rights and dignity of people with disabilities. States-Parties to the Convention have an obligation to promote, protect and ensure the full enjoyment by persons with disabilities of their rights and to ensure their equality before the law.



*The Standard Minimum Rules for the Treatment of Prisoners (UN Nelson Mandela Rules) (2015)*¹²

Nelson Mandela Rules are the revised UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the UN General Assembly on August 30, 1955.

The revised Rules emphasize the principle of humane treatment of persons deprived of their liberty, as well as an absolute prohibition on torture and other cruel, inhuman or degrading treatment. According to the Rules, persons deprived of their liberty are entitled to the same standards in the field of medical care as their fellow citizens are not deprived of liberty. The Rules state the right of prisoners living with HIV to have access to antiretroviral drugs. The document also mentions the need to provide convicts with treatment for TB and drug addiction.

¹¹ URL: https://zakon.rada.gov.ua/laws/show/995_g71#Text

¹² URL: https://www.un.org/ru/events/mandeladay/mandela_rules.shtml

HIV/AIDS



*The Denver Principles (1983)*¹³

A statement from the Advisory Committee of People Living with AIDS proclaims that people living with AIDS condemn attempts to identify them as “victims” (a term meaning defeat), and that they are only rarely “patients” (a term that implies passivity, helplessness and dependence on the care of others). The principles include guidelines for avoiding stigma and asking for support for people living with AIDS; for these people themselves, as well as for the rights of people living with AIDS protection.



*The Paris Declaration, adopted at the Paris AIDS Summit (1994)*¹⁴

The call for the active and meaningful participation of people living with HIV/AIDS was formally made in 1994, when 42 countries signed the Paris Declaration. The Declaration proclaims, *inter alia*, that “Increased involvement of people living with or affected by HIV/AIDS is crucial for an ethical and effective national response to the epidemic,” accordingly, they agreed to “support greater participation by people living with HIV/AIDS, at all ... levels... and... to stimulate the creation of a favorable political, legal and social environment.”



*Declaration of Commitment on HIV/AIDS, approved by the UN General Assembly Resolution S-26/2 (2001)*¹⁵

Paragraph 1 of the Declaration of Commitment on HIV/AIDS (hereinafter, the Declaration) states: “We, heads of States and Governments and representatives of States and Governments, assembled at the United Nations, from 25 to 27 June, 2001, for the twenty-sixth special session of the General Assembly, convened in accordance with resolution 55/13 of 3 November 2000, as a matter of urgency, to review and address the problem of HIV/AIDS in all its aspects, as well as to secure

a global commitment to enhancing coordination and intensification of national, regional and international efforts to combat it in a comprehensive manner;

[...]

Solemnly declare our commitment to address the HIV/AIDS crisis by taking action as follows, taking into account the diverse situations and circumstances in different regions and countries throughout the world”.

Regarding the prevention of the spread of HIV/AIDS in the world, the analyzed international document states that it should be the basis for response measures.

This one and subsequent similar declarations signal countries’ commitment to the fight against HIV in line with UNAIDS’ goals and include an agreement to report on countries’ progress towards their goals every two years.

¹³ URL: https://data.unaids.org/pub/externaldocument/2007/gipa1983denverprinciples_en.pdf

¹⁴ URL: https://data.unaids.org/pub/externaldocument/2007/theparisdeclaration_en.pdf

¹⁵ URL: https://zakon.rada.gov.ua/laws/show/995_846#Text

In 2001, within the framework of Ukraine's support for the provisions of the Declaration of Commitment on HIV/AIDS, adopted by the Special Session of the UN General Assembly, the Cabinet of Ministers of Ukraine by its Ordinance No. 890-p "On monitoring and evaluation of the effectiveness of measures to control the state of the HIV/AIDS epidemic according to national indicators" of 13 December, 2004,¹⁶ obliged the central executive authorities to monitor and evaluate the effectiveness of measures to control the state of the HIV/AIDS epidemic, according to national indicators. In pursuance of this Ordinance, the MOH of Ukraine has established a list of national indicators for monitoring and evaluating the effectiveness of measures in response to the HIV/AIDS epidemic in accordance with the recommendations of UNAIDS Management. Such step included regular reporting based on a set of indicators adopted by various countries, contributing to the tracking of the global HIV/AIDS pandemic, and comparison of regional and national trends.

The main document for obtaining the most complete standardized data on the state of the epidemic and progress in response to the epidemic in Ukraine is the National Report on the Implementation of the Declaration of Commitment on HIV/AIDS. Such reports are available on the UNAIDS website¹⁷.

The main results of the National Report are reflected in the List of 25 National Indicators for Monitoring and Evaluating the Effectiveness of Measures. Progress against some of the indicators is calculated on the basis of data from existing sources of statistical reporting. To calculate others, special sociological and epidemiological studies are conducted, both among the general public and among vulnerable to HIV infection groups.



*Political Declaration on HIV/AIDS approved by the UN General Assembly Resolution 60/262 (2006)*¹⁸

By signing the Political Declaration on HIV/AIDS, adopted by the UN General Assembly (hereinafter, the 2006 Political Declaration), countries committed themselves to provide universal access to HIV/AIDS prevention, treatment, care and support services for all those who need those by 2010.

According to Paragraph 11 of the 2006 Political Declaration, access to medication in the context of pandemics, such as HIV/AIDS, is one of the fundamental elements to achieve progressively the complete realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Paragraph 23 states that prevention, treatment, care and support for those infected and affected by HIV/AIDS are mutually reinforcing elements of an effective response, and must be integrated in a comprehensive approach to combat the pandemic.

Countries that ratified the Political Declaration committed themselves to intensifying efforts to enact, strengthen or enforce (as appropriate) legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV and members of vulnerable groups, and to ensure the full enjoyment of all human rights and fundamental freedoms by them, in particular to ensure the access to, *inter alia*, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and developing strategies to combat stigma and social exclusion due to the epidemic (Paragraph 29).

The document places special emphasis on the protection of children's rights. In particular, under Paragraph 32, states "commit ourselves also to addressing as a priority the vulnerabilities faced by children affected by and living with HIV; providing support and rehabilitation to these children and their families, women and the elderly, particularly in their role as caregivers; promoting child-oriented HIV/AIDS policies and programmes

¹⁶ URL: <https://zakon.rada.gov.ua/laws/show/890-2004-p#Text>

¹⁷ URL: <http://unaids.mio.guru/en/dataanalysis/knowyourresponse/countryprogressreports/2019countries>

¹⁸ URL: https://www.un.org/ru/documents/decl_conv/declarations/aidsdecl.shtml

and increased protection for children orphaned and affected by HIV/AIDS; ensuring access to treatment and intensifying efforts to develop new treatments for children; and building, where needed, and supporting the social security systems that protect them”.

The 2006 Political Declaration also pays attention to the need for accelerated scale-up of collaborative activities on TB and HIV, in line with the Global Plan to Stop TB 2006–2015, and for investment in new drugs, diagnostics and vaccines that are appropriate for people with TB-HIV co-infection (Paragraph 33).



*International Guidelines on HIV/AIDS and Human Rights
(2006 consolidated version)*¹⁹

These Guidelines were issued by the Office of the United Nations Commissioner for Human Rights together with UNAIDS in 1998 as a tool for states to develop, coordinate and implement effective national HIV/AIDS policies and strategies. The Guidelines, developed by experts during an international consultation in 1996, provide a framework for rights-based responding to the human HIV/AIDS epidemic by describing how human rights standards could be applied in the context of HIV/AIDS and adapting them to practical action at the national level, based on three broad approaches:

- improving governmental capacity for intersectoral coordination and accountability;
- reforming legislation and the legal support service with a focus on combating discrimination, protecting public health and improving the status of women, children and marginalized groups; and
- supporting and strengthening the participation of the private sector and communities for an ethical and effective response to HIV/AIDS.

The Office of the United Nations Commissioner for Human Rights calls on governments, national human rights institutions, non-governmental organizations and people living with HIV and AIDS to use the Guidelines for training, policy formulation, advocacy and the development of HIV/AIDS-related human rights law.



*ILO Recommendation concerning HIV and AIDS and the World
of Work No. 200 (2010)*²⁰

The first international standard on HIV/AIDS in the field of labor was adopted by governments, employers’ and workers’ representatives of ILO member states at the International Labor Conference in June 2010.

The HIV pandemic has become one of the most important problems nowadays, including those arising in course of the right to work realization. In addition to the devastating impact on working women and men and their families, as well as those they are obliged to support, HIV/AIDS affects the workplace in many ways. Stigma and discrimination against people living with and affected by HIV/AIDS threatens fundamental rights at work, undermining opportunities for people to get decent jobs and permanent employment.

¹⁹ URL: <https://www.ohchr.org/documents/publications/hivaidsguidelinesen.pdf>

²⁰ URL: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/normativeinstrument/wcms_194088.pdf



*Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS, approved by the UN General Assembly Resolution 65/277 (2011)*²¹

In 2011, at the high-level meeting the UN member-states unanimously adopted a new Political Declaration on HIV/AIDS: Intensifying Our Efforts to Eliminate HIV/AIDS (hereinafter, the 2011 Political Declaration), which set ambitious goals and called on the states to double their efforts to ensure universal access by 2015, with a view to achieving the Millennium Development Goals.

The 2011 Political Declaration states that HIV prevention must be the cornerstone of national, regional and international responses to the HIV epidemic.

Under Paragraph 59, states “commit to redouble HIV prevention efforts by taking all measures to implement comprehensive, evidence-based prevention approaches, taking into account local circumstances, ethics and cultural values”.

Paragraph 77 of the 2011 Political Declaration points to the need to intensify national efforts to: create enabling legal, social and policy frameworks in each national context in order to eliminate stigma, discrimination and violence related to HIV; promote access to HIV prevention, treatment, care and support, and non-discriminatory access to education, health care, employment and social services; provide legal protections for people affected by HIV, including inheritance rights and respect for privacy and confidentiality; and promote and protect all human rights and fundamental freedoms, with particular attention to all people vulnerable to and affected by HIV.

The document addresses the need to implement national HIV and AIDS strategies that promote and protect human rights, including programmes aimed at eliminating stigma and discrimination against people living with and affected by HIV, including their families, including through sensitizing the police and judges; training health-care workers in non-discrimination, confidentiality and informed consent; supporting national human rights learning campaigns, legal literacy and legal services; as well as monitoring the impact of the legal environment on HIV prevention, treatment, care and support (Paragraph 80).



*Transforming our world: the 2030 Agenda for Sustainable Development, approved by the UN General Assembly Resolution 70/1 (2015)*²²

The so-called Sustainable Development Goals, approved at the high-level political meeting on sustainable development on 25 September, 2015, replaced the goals proclaimed in the Millennium Declaration adopted by 189 countries at the UN Summit in September 2000.²³

The Agenda declares an acceleration of progress in the fight against malaria, HIV/AIDS, tuberculosis, hepatitis, Ebola and other infectious diseases, and epidemics, in particular, by addressing the issues of growing antimicrobial resistance and non-observable diseases affecting developing countries.

Sustainable development measures should be carried out bearing all people in mind, especially those who are subject to constant discrimination and stigmatization. People living with HIV often belong to vulnerable, marginalized sections of the population who suffer from social inequality.

²¹ URL: https://www.un.org/ru/documents/decl_conv/declarations/aids_decl2011.shtml

²² URL: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E

²³ URL: https://zakon.rada.gov.ua/laws/show/995_621#Text

10 of 17 The Sustainable Development Goals are related to the fight against the HIV/AIDS epidemic in one way or another²⁴:

1. Goal 1: end poverty;
2. Goal 2: end hunger;
3. Goal 3: ensure healthy living conditions;
4. Goal 4: provide equal education;
5. Goal 5: achieve gender equality;
6. Goal 8: promote economic growth;
7. Goal 10: reduce the manifestations of inequality;
8. Goal 11: make cities safe and resilient;
9. Goal 16: promote the development of peaceful and inclusive societies;
10. Goal 17: strengthen the means of implementation.

The resolution states that the Objectives of the Agenda can only be achieved by attaining the Global Partnership, bringing together governments, civil society, the private sector, the UN system and other actors, and mobilizing all available resources. In Ukraine, there has been drafted Ordinance of the Cabinet of Ministers of Ukraine “On approval of the Concept of the National Targeted Social Program for Combating HIV/AIDS for 2019-2023”²⁵, which, however, was never adopted. It should also be noted that, contrary to the Sustainable Development Goals, the provisions of the Millennium Declaration have been implemented in national legislation. Thus, the Law of Ukraine “On Approval of the National Targeted Social Program for Combating HIV/AIDS for 2014-2018” of October 20, 2014²⁶ approved a program aimed at reducing the incidence and mortality from HIV/AIDS, providing quality and available HIV prevention and diagnosis services (primarily for high-risk groups for HIV infection), treatment, care, and support for people living with HIV, as a part of health care reform.



*Consolidated Guidelines on the Use of Antiretroviral Drugs for Treating and Preventing HIV Infection, 2nd edition (WHO, 2016)*²⁷

The Guidelines provide guidance on diagnosing HIV, using antiretroviral drugs to treat and prevent HIV, and caring for people living with HIV. They are structured in chronological order: testing, prevention, treatment and care. The second edition updated the Consolidated Guidelines for the Use of Antiretroviral Drugs as of 2013 after a thorough examination of the evidence and consultations during 2015. Their publication is driven by changing global trends in HIV and health in general.

The objectives of these Guidelines are to ensure:

- updated, evidence-based clinical guidelines outlining the approach to health care in the provision of antiretroviral drugs for the treatment and prevention of HIV in the context of HIV care, with an emphasis on conditions with disabilities and resources in the health care system;
- guidance on key service delivery issues to be addressed to increase access to HIV care, strengthen the continuity of HIV care, and further integrate antiretroviral care into health systems;
- program guidance for decision-makers and planners at the national level to adapt, prioritize and implement clinical and operational guidelines and monitor their implementation and impact.

²⁴ URL: https://www.unaids.org/en/AIDS_SDGs

²⁵ URL: https://moz.gov.ua/uploads/1/5670-pro_20180621_1.pdf

²⁶ URL: <https://zakon.rada.gov.ua/laws/show/1708-18#Text>

²⁷ URL: https://apps.who.int/iris/bitstream/handle/10665/208825/9789241549684_eng.pdf?sequence=1&isAllowed=y



*Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030, approved by the UN General Assembly Resolution 70/228 (2016)*²⁸

The Political Declaration on HIV and AIDS: On the Fast Track to Accelerating the Fight against HIV and to Ending the AIDS Epidemic by 2030 (hereinafter, the 2016 Political Declaration) was adopted by the UN General Assembly in 2016. Thus, in June 2016, at its high-level meeting on ending HIV/AIDS, the UN General Assembly adopted the Fast-Track Strategy Ending the AIDS Epidemic by 2030²⁹, which set ambitious goals for the international community: to identify 90 percent of PLHIV, provide 90 percent of them with antiretroviral therapy (ART) and ensure the effective treatment for 90 percent of people receiving ART by 2020³⁰. Applying the UNAIDS approach will avert approximately 28 million new HIV cases and 21 million AIDS-related deaths, avert additional HIV costs of USD 24 billion, and end the global HIV pandemic, all by 2030. In the 2016 Political Declaration, the UN member states stressed upon the continued importance of an integrated approach to combatting AIDS, TB, hepatitis B and C.

The 2016 Political Declaration specifically lists special preventative interventions, including: outreach through traditional and social media and peer-led mechanisms; male and female condom programming; voluntary medical male circumcision; medication-assisted therapy programmes; injecting equipment programmes; pre-exposure prophylaxis for people at high risk of acquiring HIV; antiretroviral therapy; and other relevant interventions. It promises to “intensify efforts towards the goal of comprehensive prevention, treatment, care and support programmes that will help to significantly reduce new infections, increase life expectancy and quality of life, and promote, protect and fulfil all human rights and the dignity of all people living with, at risk of and affected by HIV and AIDS, and their families”.

Paragraph 62(a) of the 2016 Political Declaration states: “[we] recognize that the AIDS response can be fast-tracked only by protecting and promoting access to appropriate, high-quality, evidence-based HIV information, education and services”.

It should be noted that as of 1 January 2018, 141,371 HIV-positive persons (or 333.3 persons per 100,000 population) were registered with health care facilities in Ukraine, 43,816 of whom had an AIDS diagnosis (103.3 persons per 100,000). At the same time, during the period of implementation of the National Targeted Social Programme for Combatting HIV/AIDS for 2014-2018 there has been a tendency for stabilization of the epidemic situation in comparison with the initial indicators. The official statistics, from 2013 (baseline) to 2017 shows that the number of HIV cases in the age group from 15 to 24 decreased by 38 percent (from 1,534 to 944 cases); the frequency of mother-to-child transmission of HIV almost halved (from 3.9 percent to 2.2 percent (the 2017 figure is based on early diagnosis)); the incidence of AIDS stabilized (at the level of 19.8 – 22.8 cases per 100,000 population); the prevalence of HIV among pregnant women decreased from 0.87 percent to 0.71 percent; the prevalence of HIV among sex workers decreased from 7.3 percent to 5.2 percent; the prevalence of HIV among injecting drug users stabilized at 19-22 percent; coverage of antiretroviral therapy increased 1.8 times (from 55,784 to 98,237 people); and the proportion of people who stuck with antiretroviral therapy for 12 months or more increased from 69 percent to 88 percent.

In 2018, the Cabinet of Ministers of Ukraine published the draft Ordinance “On approval of the Concept of the National Targeted Social Programme for Combatting HIV/AIDS for 2019-2023”³¹, developed by the MOH of Ukraine, for public consultation. The Concept was designed to stop the HIV epidemic in the country, prevent new HIV infections, and reduce mortality from HIV-related diseases, which requires large-scale and comprehensive measures to prevent, diagnose, treat, care for and support PLHIV.

²⁸ URL: https://www.unaids.org/sites/default/files/media_asset/2016-political-declaration-HIV-AIDS_en.pdf

²⁹ URL: http://www.unaids.org/sites/default/files/media_asset/2016HighLevelMeeting_en.pdf

³⁰ URL: http://www.unaids.org/sites/default/files/media_asset/2016HighLevelMeeting_en.pdf

³¹ URL: https://moz.gov.ua/uploads/1/5670-pro_20180621_1.pdf#2

The draft offers two ways to reverse the HIV/AIDS:

- continuation of funding for a set of measures aimed at combatting the epidemic, which is the basis of the National Targeted Social Programme for Combatting HIV/AIDS for 2014-2018. However, this approach does not take into account the current trends in the HIV epidemic in the country as a whole and in individual regions in particular, and does not ensure compliance with the country's commitment to significantly slow the spread of HIV by 2020, as a necessary intermediate stage to end the epidemic by 2030;
- transition to the principles and approaches of public health, including strengthening of the primary health care system, decentralization, and priority funding of measures proven to be effective, such as: treatment; HIV antibody testing services; prevention programmes for key groups at risk of HIV, including new groups affected by the epidemic; care and support services for PLHIV, their inner circle; and the implementation of the Sustainable Response Strategy for TB Epidemics, including drug-resistant TB, and HIV/AIDS for the period up to 2020, approved by the Cabinet of Ministers of Ukraine in 2017. This optimal and evidence-based approach will allow to fulfil Ukraine's international obligations, achieve the set goals and promote the reform of Ukraine's health care system.



*WHO Consolidated Guidelines on Person-Centered HIV Patient Monitoring and Case Surveillance (2017)*³²

These Guidelines apply to HIV monitoring and surveillance within consolidated national monitoring systems that support patient care and report on most programmatic, national and global indicators. The guidelines describe how to develop a robust, coherent patient monitoring and surveillance system, which can be complemented by the necessary surveys and special studies, as needed.

The Guidelines consolidate recommendations for patient monitoring systems and all HIV cases as part of health surveillance. They meet the basic tenets of the People-Centered Sustainable Development Goals, which are designed on the principle of "leave no one behind". In particular, two specific Sustainable Development Goals (17.18 and 17.19) require increased availability of disaggregated data and expanded analysis and the ability to use data to improve programs. The Guidelines apply these objectives in practice.

The overall objective of these Guidelines is to support countries in implementing a "treat all" approach and incorporating WHO's strategic HIV information indicators into national health information management systems.

The Guidelines aim, in particular, at:

- upgrading the means of monitoring and reporting on people living with HIV at the level of health care facilities and expanding the use of integrated monitoring tools in places where treatment and care are integrated (for example, where ART is provided in health care facilities to mother, new-born and children, and people with TB). One of the goals is also to strengthen ties, follow up as patients move between different medical facilities;
- expanding existing HIV surveillance systems to apply or strengthen HIV surveillance approaches that regularly record and link individual data on all reported HIV cases over time and from different sources. These include HIV testing sites, health care facilities, laboratories, etc.;
- investing in the adoption or expansion of unique patient identifiers to link individual patient records within facilities, programs, and between different health services.

Ukraine supports key areas of international policy to promote fundamental human rights in the field of HIV/AIDS, in particular by incorporating international standards into the national legislation.

³² URL: <https://apps.who.int/iris/bitstream/handle/10665/255702/9789241512633-eng.pdf?sequence=1>



*International Guidelines on Human Rights and Drug Policy, UNDP (2019)*³³

Drug control intersects with much of the 2030 Agenda for Sustainable Development and the commitment of UN member states to leave no one behind. In line with the UNDP Strategic Plan Agenda 2018-2021 and the HIV, Health and Development Strategy 2016-2021: Connecting Points, International Guidelines on Human Rights and Drug Policy ensure a full set of international legal standards for the placement of human dignity and sustainable development at the center of Member States' response to drug trafficking. The Guidelines cover a wide range of key issues,

from development to criminal justice in the field of health care. They were developed by a coalition of UN member states, WHO, UNAIDS, UNDP and leading experts on human rights and drug policy. The guidelines are an example of UNDP's support for the practical integration of international human rights commitments into national, regional and global policies and programs.

According to the Guidelines, everyone has the right to enjoy the benefits of scientific progress and its applications. To ensure this right, States should, in particular, take legislative and other appropriate measures to ensure that scientific knowledge and technology and its application, including scientifically sound, scientifically validated measures to treat drug addiction, prevent overdose and prevent, treat and control of HIV, hepatitis C and other diseases, were physically and financially accessible without discrimination.

In the context of the right of everyone to life, States have an obligation to take positive measures to increase the life expectancy of drug users, including adequate steps to provide scientifically sound information, tools, goods and services to prevent, and respond to drug use and reduce harm, including such as overdose, HIV, viral hepatitis and other infections and injuries, sometimes related to drug use.

With regard to the protection of the rights of persons deprived of their liberty, States have an obligation, *inter alia*, to ensure that all persons deprived of their liberty have access to voluntary and evidence-based medical services, including harm reduction and drug treatment, as well as to basic medicines, HIV and hepatitis C treatment services to a standard equivalent to that, commonly accepted in the community.



*"Renewing our voice" – Code of Good Practice for NGOs Responding to HIV/AIDS*³⁴

This Code establishes a number of Guidelines that apply a human-right approach to the spectrum of HIV/AIDS-related work, namely on health, development and humanitarian activities carried out by non-governmental organizations responding to HIV/AIDS. These principles provide a common framework applicable to all non-governmental organizations dealing with HIV/AIDS and are embodied in the principles of good practice that define how they work as non-governmental organizations (Chapter 3 – Organizational Principles) and relating to their activities (Chapter 4 –

Program Principles). Chapter 5 includes key resources such as tools and guides that can help apply these principles in practice. It also includes information on the process of "signing" the Code and on its implementation.

³³ URL: <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/international-guidelines-on-human-rights-and-drug-policy.html>

³⁴ URL: <https://www.who.int/3by5/partners/NGOcode/en/>

TUBERCULOSIS



*Moscow Declaration to End Tuberculosis adopted at the WHO First Global Ministerial Conference (2017)*³⁵

The Preamble to the Moscow Declaration to End Tuberculosis states: “[every day] TB kills more than five thousand children, women and men and leaves no country untouched. It is one of the leading killers among people of working age, ... with potential catastrophic social and economic consequences for families, communities, and countries”.

Health Ministers and members of the other agencies who participated in signing of the Moscow Declaration committed on behalf of the countries they represent to:

- scaling up TB prevention, diagnosis, treatment and care and working towards the goal of universal health coverage through public and private health care providers to achieve detection of at least 90 percent of cases, and successful treatment of at least 90 percent of those detected in all countries, through the use of rapid diagnostics (including molecular diagnostics), appropriate treatment, patient-centred care and support that applying WHO-recommended standards of care, and harnessing digital health;
- prioritizing, as appropriate, notably through the involvement of communities and civil society and in non-discriminatory manner, high-risk groups and populations in vulnerable situations in a non-discriminatory manner, such as women and children, indigenous peoples, health-care workers, the elderly, migrants, refugees, internally displaced people, prisoners, people living with HIV/AIDS, people who use drugs, miners, urban and rural poor and under-served populations, without which elimination of TB will not be possible;
- addressing MDR-TB as a global public health crisis including through a national emergency response in at least all high MDR-TB burden countries, while ensuring that robust systems are sustained in all countries to prevent emergence and spread of drug resistance;
- rapidly scaling up access to patient-centred, integrated TB and HIV services and collaborative activities to end preventable deaths due to TB among people living with HIV/AIDS;
- achieving synergies in managing TB, co-infections and relevant noncommunicable diseases, undernutrition, mental health and harmful use of alcohol and other substance abuse, including drug injection;
- working to increase, when relevant, access to new and effective TB drugs under strict programmatic monitoring and follow-up;
- ensuring, as appropriate, adequate human resources for TB prevention, treatment and care; and
- reducing stigma, discrimination and community isolation, and promoting patient-centred care including community-based treatment options, as well as psychosocial and socioeconomic support.

³⁵ URL: https://www.who.int/tb/features_archive/Russian_MoscowDeclarationtoEndTB.pdf?ua=1



*Political Declaration on the Fight against Tuberculosis approved by the UN General Assembly Resolution 73/3 (2018)*³⁶

On 26 September, 2018, the first-ever High-Level Meeting of the UN General Assembly to address TB, “United to End Tuberculosis: An Urgent Global Response to a Global Epidemic”, took place in New York.

The High-Level Meeting on TB was an unprecedented and important step for governments and all partners involved in the fight against TB. The Meeting continued the work started at the Ministerial Conference on the Elimination of TB, held in Moscow on November 16-17, 2017, and culminated in the commitment of high-level ministers and other leaders from 120 countries to accelerate progress towards eliminating TB.³⁷

The outcome of the High-Level Meeting was the adoption by the Heads of States of a large-scale Political Declaration on the Fight against Tuberculosis, approved by UN General Assembly resolution of October 10, 2018 (hereinafter, the 2018 Political Declaration), which promotes measures to eradicate the disease and increase investment in this area, as well as save millions of lives.

The document declares the commitment to ending the TB epidemic globally by 2030 in line with the Sustainable Development Goals, and pledges states to provide leadership and to work together to accelerate national and global collective action, as well as investment and innovation in the interests of the disease eradication as soon as possible. TB, including its drug-resistant forms, is a critical challenge and the leading cause of death from infectious disease, the most common form of antimicrobial resistance globally and the leading cause of death for people living with HIV and those below the poverty line. Gender inequality, vulnerability, discrimination and marginalization increase the risk of TB and its devastating impacts, including stigma and discrimination at all ages, so that the disease requires a comprehensive response, including the approach of achieving universal health coverage, and one that addresses the social and economic determinants of the epidemic and that protects and ensure human rights and dignity of all people.

Paragraph 14 of the 2018 Political Declaration points to the profound socioeconomic challenges and financial hardships faced by people affected by TB, including: difficulties in obtaining an early diagnosis; to the need to undergo extremely long treatment regimens, with drugs that can involve severe side effects; as well as barriers to securing integrated support.

The 2018 Political Declaration stresses the need to protect and promote the right to the enjoyment of the highest attainable standard of physical and mental health, in order to advance towards universal access to high-quality, affordable and equitable prevention, diagnosis, treatment, care and education related to TB and multidrug-resistant TB and support for those who become disabled due to TB, integrated within health systems towards achieving universal health coverage and removing barriers to care. The document also calls on states to: address the economic and social determinants of the disease; and to promote and support an end to stigma and all forms of discrimination, including by removing discriminatory laws, policies and programmes against people with TB, and through the protection and promotion of human rights and dignity, as well as policies and practices which improve outreach, education and care (Paragraph 37).

Countries that signed 2018 Political Declaration have committed to enabling and pursuing multisectoral collaboration at the global, regional, national and local levels, across health and nutrition, finance, labour, social protection, education, science and technology, justice, agriculture, environment, housing, trade, development and other sectors, in order to ensure that all relevant stakeholders pursue actions to end TB and leave no one behind (Paragraph 39).

³⁶ URL: <https://undocs.org/ru/A/RES/73/3>

³⁷ URL: https://www.who.int/tb/features_archive/Russian_MoscowDeclarationtoEndTB.pdf?ua=1



SELECTED COUNTRIES' LEGISLATION AND CASE LAW ON HIV/AIDS AND TUBERCULOSIS



Austria

AIDS LAW BGBl. NR. 728/1993 (extracts)³⁸

The Federal Minister of Health, Sports and Consumer Protection is responsible for monitoring the HIV/AIDS situation.

Health-care facilities report him/her on cases of HIV infection and deaths from AIDS, within one week of the diagnosis or death.

If a person is diagnosed with HIV, a medical worker must inform this person. The medical worker must also inform the person on the types of infection, and on what they should do to avoid infecting others.

HIV can only be diagnosed using up-to-date techniques and the established quality assurance criteria.

Judgement of the Federal Administrative Court of Austria of April 25, 2019, in Case No. I412 2142541-2³⁹

Facts of the Case.

The applicant, a Nigerian citizen, is HIV-positive. In 1997, he entered Austria illegally using forged documents.

During 1999-2016, he was repeatedly convicted for various offences including: causing bodily harm (both intentionally and negligently), threatening violence, transmission of contagious diseases, resistance to detention, fraud, and crimes against proprietary rights.

Following his release from prison, the authorities ordered the applicant to leave Austria. He disagreed with this decision, citing the fact that he was dependent on antiretroviral therapy, and that his country of citizenship had high rates of HIV and limited access to treatment. In response, Nigerian government officials have sent a factsheet on HIV in Nigeria, which provided evidence of positive developments in incidence rates and treatment.

The applicant also requested international protection in view of the fact that he was at risk of possible ill-treatment in his country of citizenship, given his HIV-positive status.

³⁸ URL: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010768>

³⁹ URL: <https://tinyurl.com/yxkzpeha>

Findings in and consequences of the judgement.

The applicant was deported to Nigeria. The court grounded its judgement by the following arguments.

The factsheet issued by the applicant's country of citizenship did not contain any evidence that the applicant would have been deprived of his basic means of subsistence, if he had returned to Nigeria. He was an adult, able-bodied person who spoke the language of his country, and in Nigeria, the law prohibits discrimination in employment against people living with HIV. The factsheet contained information about available treatment options for HIV. The applicant was able to seek advice from a number of health-care facilities, and in some cases, appropriate medication was provided to patients free of charge. Thus, the applicant had the opportunity to seek a job that suited him and to secure his livelihood.

The Federal Court also referred to the European Convention for the ECHR and stated that if the applicant was returned to the country of citizenship, his rights to life and to protection from torture, inhuman or degrading treatment or punishment would be upheld, in accordance with the information contained in the official documents of Nigeria.



LAW ON THE PROTECTION OF PUBLIC HEALTH NO. 258/2000 (extracts)

§ 53 (1) Individuals infected with HIV, individuals suffering from infectious diseases, other than pathogenic microbes of typhoid fever and paratyphoid fever, and individuals with chronic viral hepatitis B and C, if they or their legal representatives have been informed of this fact by a doctor (hereinafter, the carriers), must:

- (a) undergo treatment, medical supervision, necessary laboratory tests and other anti-epidemic measures;
- (b) follow the instructions of the doctor on the protection of other individuals from the transmission of an infectious disease, carriers of which they are;
- (c) not carry out activities in which they will endanger the health of other individuals; and
- (d) inform the doctor about their status before any examination or treatment and after hospitalization in a health care institution. If the carrier is unconscious, he or she should do so as soon as their state of health allows.

THE CZECH CRIMINAL CODE contains no special rules on HIV or TB. Charges are brought under general articles (communication of an infectious disease: intentional (Art. 152) and negligent (Art. 153)).

Judgement of the Supreme Court No. 8 Tdo 1163/2015

The Supreme Court substantiated the so-called "zero-concentration doctrine", whereby when making decisions on the cases, courts must pay attention to the viral load of HIV in the person's blood. This doctrine is based on the fact that the chance of transmitting HIV to a sexual partner is zero, as long as the level of HIV in the infected person's blood remains at such a level that it is impossible to detect.

Effective HIV treatment (antiretroviral therapy) suppresses the amount of HIV in body fluids to such an extent that standard tests do not detect HIV or can find only a small trace of it.

This does not mean that the person has been cured of HIV. If treatment is stopped, the concentration of HIV will increase again.

Unidentified viral concentration means that there is not enough HIV in biological fluids for sexual transmission, and therefore the person is not contagious.

Judgement of the Supreme Court No. 6 Tdo 378/2018

HIV should be considered as seriously damaging to health, as it imposes certain restrictions on the patient, in particular the requirements for regular examinations and adherence to a treatment regimen, and the fact that it is a life-long condition.



Germany

According to the Criminal Code, infecting another person with HIV intentionally or as a result of negligence qualifies as a bodily harm.

Although a HIV-positive person is not required to notify his or her partner of their status, such notification and the consent expressed in connection therewith will determine whether the person should be punished.

Judgement of the Constitutional Court 2 BvR 1541/15⁴⁰

Facts of the Case.

A prisoner serving a life sentence complained that he had been tested for HIV without his consent. The courts of general jurisdiction found this to be illegal.

The applicant also requested that the prison administration grant him full access to his medical records, which he was denied. The applicant filed a court suit. He noted that he had donated blood many times while in prison, and access to medical records could reveal other cases of illegal HIV tests.

The regional court dismissed the applicant's claim, stating that if the prisoner had requested access to certain documents, he had to prove that he needed such access to protect his rights and not simply to obtain information.

Findings in and consequences of the judgement.

The Constitutional Court found that in this case there was a question of a person's right to "informational self-determination", namely the ability to dispose of his personal data, in particular to make decisions on disclosure thereof. This right gives the data subject (in this case, the prisoner), *inter alia*, access to such data held by third parties.

The regional court did not take into account the fact that the provisions of the Constitution of Germany entitle the patient to check their own medical records. The applicant explained that he wanted full access to his medical records in order to exercise his right to informational self-determination and to verify the legality of his treatment and record keeping. The applicant's right to self-determination can only be limited in exceptional cases. However, even in such a case it is necessary to balance competing interests with the applicant's right to self-determination. The regional court did not indicate any aspects that might outweigh the applicant's right to the information.

⁴⁰https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/12/rk20161220_2bvr154115.html

The Constitutional Court found that the judgement of the inferior court did not comply with the Constitution of Germany.

The Constitutional Court also referred to Article 8 of the ECHR and stated that the patient was not obliged to state the reasons for his desire to obtain his medical records; rather, this right should be granted to him.

According to international standards, prisoners receiving medical treatment should be provided with all relevant information about their health, course of treatment and prescribed medication; it is desirable that they have the right to inspect the contents of medical records held by prisons, unless it is appropriate to restrict their access thereto for therapeutic reasons.

The Netherlands

CONSTITUTION

Art. 1 states that discrimination on the any grounds shall not be permitted.

LAW ON HEALTH CARE AND PUBLIC HEALTH ENDANGERMENT PREVENTION OF OCTOBER 9, 2008

The Law places responsibility on municipal (settlement or town) councils for promoting and implementing collective prevention. Municipal authorities are obliged to implement this law through their municipal health department for collective prevention of infectious diseases such as TB, HIV/AIDS and others, or in the event of an epidemic. According to Art. 2a, the municipal council should develop a memorandum on health policy every four years.

LAW ON SPECIAL MEDICAL PROCEDURES OF OCTOBER 24, 2007

HIV treatment is covered by the Law on Special Medical Procedures, under which HIV can only be treated in 22 hospitals and HIV treatment centers. The requirements that these HIV treatment centres need to meet are listed in this Law.

LAW ON MEDICAL EXAMINATIONS OF JULY 5, 1997

HIV testing as part of medical examinations for potential employees is prohibited.

Peter M., who worked as a nurse in Groningen, was sentenced to eight years in prison for infecting men with injections containing HIV-infected blood. After serving his sentence, he began working as a nurse again. The Health Inspectorate learned of this and referred the case to a disciplinary court.

M. was the main person involved in the HIV infection case in Groningen. He and another suspect were accused of drugging men and injecting them with infected blood. M. was imprisoned in 2007 and released early in late 2012.

After his release, M. got a job as a nurse in two health care facilities. The employer did not request good-conduct certificate when they hired him, and M. was silent about his past. However, the Health Inspectorate received complaints against M from his colleagues, who stated that he was abusive towards them.

The Inspectorate referred the case to a disciplinary court. M. refused a psychiatric examination. The court ruled that there were strong doubts as to whether M.'s patients could trust him, and therefore decided to exclude him from the medical register; consequently, he was no longer able to work as a nurse.



CRIMINAL CODE OF THE REPUBLIC OF POLAND (extracts)

Article 161.4 Protection of a person against infection

- § 1. Whoever, knowing that he or she is infected with the HIV, directly exposes another person to infection of that disease, shall be subject to imprisonment for a term from six months to eight years.
- § 2. Whoever, knowing that he or she is afflicted with a venereal or contagious disease, a serious incurable disease or a life-threatening disease, directly exposes another person to infection of that disease, shall be subject to imprisonment for a term from three months to five years.
- § 3. In case the offender referred to in § 2 poses at risk of infecting many people, he or she shall be subject to imprisonment for a term from one to ten years.
- § 4. The prosecution for the offence specified in § 1 or 2 shall be initiated by a motion of the injured person.

Judgement of the Polish Constitutional Tribunal of November 23, 2009, in Case No. 150/10/A/2009⁴¹

Facts of the Case.

The Voivodeship Medical Commission of the Ministry of Internal Affairs stated in its decision No. 90/I/07 of February 8, 2007, that a police officer cannot exercise his/her professional duties if he/she is HIV positive. The District Medical Commission of Gdansk came to a similar conclusion. On October 3, 2007, a police officer was dismissed on the basis of the findings of both commissions. The police officer, disagreeing with the decision, filed a claim with the court for the protection of his violated rights, stating that clause 57(4) of Annex 2 of the relevant governmental Regulation was being applied “mechanically” (“automatically”), which, in his opinion, contradicts Art. 32, Art. 31 of Paragraph 3 and Art. 60 of the Constitution and § 11 and § 12 item 1 of the relevant governmental Regulation. According to the plaintiff, the real reason for his dismissal was the fact that he was HIV positive, given that he had none of the symptoms of AIDS. This contradicts the principle that follows from Art. 25-1 of the Law on Police Service and § 11 and § 12 item 1 of the relevant governmental Regulation, proclaiming that capacity to serve in the police should be determined by the severity of a disease and its impact on the psychological and physical condition of the police officer.

Findings in and consequences of the judgement.

The Constitutional Tribunal decided to question the constitutionality of Art. 57, paragraph 4, of Annex 2 to the relevant governmental Regulation due to the disproportionate nature of the restriction on access to public service introduced by this provision.

The reason for the negative assessment of the contested decision was not simply the recognition of HIV status as one of the factors determining fitness for police service, but the excessive severity of the consequences. This means limiting the ability to assess the actual psychological and physical capacity of police officers in connection with the findings of medical commissions, which indicated that a HIV-positive person without any AIDS symptoms and in good health could not work in the police in any position. The immediate reason for this approach was the automatic classification of such persons as health category D (unfit), which had been contained in the contested provision, and the impossibility of making another decision, for example, “fit for service with restrictions”.

The Judgement of the Constitutional Tribunal recognizes that the dismissal of the HIV-positive police officer was groundless. The officer’s case is pending with the Provincial Administrative Court in Gdansk.

⁴¹ <https://www.saos.org.pl/judgments/109043>

According to these provisions, a police officer who has been dismissed has the right to be reinstated to an equivalent position, provided that he is ready to take up his professional duties within seven days. A reinstated police officer is also entitled to monetary compensation for the period of enforced absence, to the equivalent of up to six months' salary for the position he used to hold before dismissal.

The court noted that until the legislation on police service is amended, medical commissions can assess the impact of HIV transmission on the health of a police officer, and assess his or her fitness for service on the basis of the general provisions of the relevant regulations.

The Constitutional Tribunal considered it necessary to note that such constitutional doubts had been also raised by sub-paragraph 57 of paragraph 5 of Annex 2 to the relevant governmental Regulation, which led to the automatic recognition of people with AIDS as unfit for service in the police. This disease can have different courses, including mild, and the symptoms that occur do not always mean that a person is completely incapable of serving in the police. For example, modern treatments for AIDS allow a person to work without feeling the effects of the disease.



ORDER OF THE MINISTRY OF HEALTH OF JUNE 24, 1987 (extract)⁴²

All donor anatomical materials donated for medical use should be tested for HIV markers.

A positive test result will mean that anatomical materials cannot be used.

If the relevant anatomical materials were obtained from abroad and have not been tested for HIV, such a test must be performed by a Spanish health-care facility; otherwise, they may not be used.

ROYAL DECREE 2210/1995 ON THE ESTABLISHMENT OF A NATIONAL NETWORK OF EPIDEMIOLOGICAL SURVEILLANCE (extracts)⁴³

The national epidemiological surveillance network includes special epidemiological surveillance systems based on case registration and surveys, which can be used for epidemiological monitoring of the spread of HIV/AIDS.

National and regional AIDS registries record cases of infection and the presence of diseases that indicate AIDS. The report is made by the doctor who has made the diagnosis. The report is made by submitting a questionnaire. The questionnaire does not contain the patient's personal data, and is only a registration of the case of infection. Patients' personal data are stored in health-care facilities.

Judgement of the Supreme Court of Spain of January 30, 2015

Facts of the Case.

The accused was diagnosed with HIV in April 2000. In 2007, he began a relationship, which lasted until 2012, with the victim. During this time, the accused hid from his partner that he was HIV-positive and had unprotected sex with her. In 2011, the woman began to suspect that her partner might be HIV-positive, so she had tests that confirmed her HIV-positive status.

⁴² URL: [https://www.boe.es/eli/es/o/1987/06/24/\(2\)](https://www.boe.es/eli/es/o/1987/06/24/(2))

⁴³ URL: <https://www.boe.es/buscar/act.php?lang=en&id=BOE-A-1996-1502&tn=&p=>

Findings in and consequences of the judgement.

The Supreme Court found that the accused had intentionally concealed his positive HIV status from the victim. It was this circumstance that formed the basis of the Court's judgement.

The court stressed the need for HIV-positive people to communicate their status to potential partners. Otherwise, they will be subject to criminal liability.



Switzerland

SWISS CRIMINAL CODE

HIV-positive persons who do not inform their sexual partners about their HIV status before an unprotected sexual intercourse may be subject to criminal liability for assault (Article 122).

In 2006, the Federal Supreme Court ruled that if a person was unaware of their HIV-positive status but was in a position to find out, and did not warn their partner about the possibility of infection, he or she would be liable for a crime committed through negligence.

Judgement of Federal Supreme Court of Switzerland in case No. 6B_337/2012⁴⁴

The Swiss Federal Supreme Court has ruled that HIV can no longer be automatically considered to cause serious harm, because life expectancy has significantly improved with the implementation of antiretroviral therapy. For example, it has reconsidered its case law regarding the severity of HIV infection.

Since 1999, any transmission or attempted transmission of HIV has been considered a cause or an attempt to cause serious harm and thus qualified as a crime under Art. 122 of the Swiss Criminal Code ("Serious bodily injury", which constitutes a serious assault of the understanding of Swiss criminal law).

The applicant appealed against the verdict of the Supreme Court of the Zurich canton, based on Art. 122 and 231 ("Dissemination of human diseases") of the Criminal Code, for transmitting HIV to a sexual partner. The Supreme Court sentenced him to 30 months' imprisonment (partly suspended). The appellant objected to the qualification of HIV transmission as a serious damage to health on the grounds that, despite an incurable chronic condition, HIV infection could be managed through ongoing treatment. The life expectancy of people living with HIV is now almost equal to the life expectancy of those who are not infected, and as a result of this progress, transmission should be qualified as a common assault under Art. 123 of the Criminal Code.

The Swiss Federal Supreme Court has noted that current scientific advances and related treatment options lead to the conclusion that HIV infection does not necessarily pose a serious threat to life. However, the court ruled that HIV infection still causes complex physiological and psychological changes throughout the life of an infected person, which in some cases can lead to serious or even life-threatening injuries.

The judgement, which came into force, repealed the previous case law of the Federal Court, according to which HIV infection was considered a serious bodily injury, which qualifies as a serious assault. The current judgement allows to qualify HIV infection as a serious assault only if the circumstances of a particular case require it. Therefore, the courts must justify in each judgement, the qualification of transmission or attempted transmission of HIV as a common assault under Art. 123 or serious assault under Art. 122 of the Criminal Code.

⁴⁴ URL: <http://criminalisation.gnppplus.net/country/switzerland>

Serious assault is punishable by imprisonment for a term not exceeding 10 years, while the maximum penalty for common assault is 3 years. This judgement will certainly limit some sentences to a maximum of 3 years for common assault, whereas the average sentence for transmitting or attempting to transmit HIV previously varied from 2 to 4 years in cases where Art. 122 and 231 were applied simultaneously.

Unlike serious assault, which is prosecuted *ex officio* (without complaint), common assault is prosecuted *ex officio* only in case of the exceptions provided for in paragraph 2 of Art. 123 concerning the use of poison or weapons, encroachments on persons under the custody of the accused or unable to defend themselves, or in the case of encroachment on the life of spouse, a person with whom the accused is in a registered relationship or a partner with whom he/she lives together.

The Federal Court rejected the other appellant's allegations, namely that the lower court had rejected the appellant's argument concerning the victim's consent to unprotected sexual intercourse; and that the lower court had erred in finding that the appellant had in fact been the one who had infected the victim. The federal court disagreed with the defendant's position that there were sufficient doubts about the victim's testimony against the accused.

The case was referred to the High Court to determine the qualification of the act as common or serious assault.



EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

According to the national legislation (Law of Ukraine No. 3477-IV “On Enforcement of Judgements and Application of the Case law of the European Court of Human Rights” of February 23, 2006) the ECtHR case law is a source of law in Ukraine. By ratifying the ECHR, Ukraine has undertaken to comply with the provisions of this treaty. The ECtHR case law is at the same time an act of official interpretation of the ECHR and the practice of its application. The ECtHR, while providing of so-called dynamic interpretation, applies the general rules of the ECHR to the specific circumstances of the case and also brings them into line with the “realities of today”. Such an approach allows the Convention to remain relevant regional instrument for human rights protection, despite the fact of its adoption in 1950. Thus, the case law of the ECtHR is an integral part of the ECHR, which is also confirmed by the provisions of the Vienna Convention on the Law of Treaties.

Regarding the enforcement of judgements and application of case law from the ECtHR, it should be noted that these concepts have different meanings. Enforcement of ECtHR judgements means that the state takes measures of an individual and general nature, determined by the ECtHR, exclusively in judgements passed regarding the state in question. Objectively, it is impossible to enforce a judgement passed regarding another state. However, the case law of the ECtHR, in particular in cases versus other states, can be used as a factor of the particular state’s legal system possible improvement. Therefore, it acts preventively, without waiting for the ECtHR to pass a similar judgement in the case “versus” it and ensuring the realization of Conventional rights, and the application of the Convention in its territory.

Another argument in favor of applying the whole body of ECtHR case law, instead of that set out in judgements regarding a particular state, is that the national legislator, when enshrining the definition of such case law, did not limit it to the case law of the ECtHR only with regard to Ukraine. This wording is fully in line with the ECtHR’s position set out in the *Opuz v. Turkey* judgement (2009). The ECtHR states that its legal positions as set out in cases not only regarding the respondent state, but regarding all states, should be taken into account. The Interlaken Declaration of February 19, 2010, states that Council of Europe (CoE) member states must take into account the ECtHR’s developing case law, with a view to considering the conclusions drawn in judgements finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system.

The preamble to the Convention enshrines the principle of the rule of law, which the ECtHR called one of the fundamental principles of a democratic society in its judgement in *Klass and Others v. Germany* (1978). According to this principle, the interference of a public authority with the human rights of individuals should be subject to effective control, including judicial control.

This Section illustrates the main issues identified by the ECtHR and examples of the ECtHR balancing public and private interests in an extremely delicate and sensitive area, namely HIV/AIDS and TB and human rights.

HIV/AIDS and human rights in the European Court of Human Rights case law

The ECtHR has identified the following problematic aspects with regard to protection of the rights of persons living with HIV/AIDS:

- stigmatization of and discrimination against people living with HIV:
 - illegal dismissal of an employee based only on their HIV-positive status
 - denial of issuance of a residence permit
 - denial of re-entry into the country to a person who permanently resided there but was not a citizen;
- unjustified imprisonment of people living with HIV
- treatment-related problems:
 - unjustified deprivation of vital treatment
 - providing inadequate treatment that resulted in complications or even the death of the victim;
- disclosure of information about a person's HIV-positive status:
 - by publishing information about him/her in the media
 - by insufficiently protecting a person's medical records;
- improper testing of donor blood and plasma
- conducting improper investigations into cases of HIV infection in health care facilities
- insufficient payment of compensation for breaches of confidentiality.

In its consideration of cases involving violations of the rights of persons living with HIV, the ECtHR found violations of Art. 2, 5, 6, 8, and 13, and Art. 14 in conjunction with Art. 8 of the Convention.

The ECtHR emphasizes that none of the Articles that the ECtHR found as being violated in the context of the rights of HIV-infected people is absolute. That is, the rights granted by them may be subject to restrictions by the state. However, such restrictions must be based on law that meets the quality criteria set out by the ECtHR, and all decisions taken in the context of these restrictions must be objective and reasoned, and based on assessment of each situation individually. Restrictions must pursue a legitimate aim and be necessary in a democratic society.

This will balance the interests of people living with HIV, who belong to one of the most vulnerable groups in the society, with the interests of individuals, public health, and the state. Also, the ECtHR notes that when a person living with HIV is under the control of the state (in particular, in places of detention), the latter is responsible for their life and must take all necessary measures to preserve it.

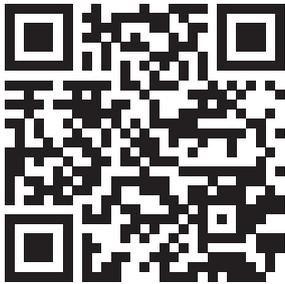
The limits of the state's margin of appreciation regarding the unequal treatment of people living with HIV compared to other persons should be narrow, given the special vulnerability of this category of persons.

Detailed legal positions on each issue are presented in *Table 1*.

Table 1.
Legal positions of the ECtHR in cases involving persons living with HIV

Name, number, link to the judgement	Z. v Finland (Application No. 22009/93) http://hudoc.echr.coe.int/eng?i=001-58033	
Date of rendering and effective date	February 25, 1997	
Facts	<p>The applicant, Z., was HIV-positive, as well as her ex-husband X.</p> <p>On March 10, 1992, the Helsinki City Court convicted X. and sentenced him to a suspended term of imprisonment for the rape of O. on December 12, 1991. The court held the trial in camera with video recording and ordered that the documents submitted in the case remain confidential for 10 years.</p> <p>On March 19, 1992, X. was informed of the results of a blood test performed on March 6, 1992 indicating that he was HIV-positive.</p> <p>In early March 1992, following a complaint of a sexual offence lodged by M., the police opened an investigation (instituted criminal proceedings) into attempted manslaughter, suspecting X. of having deliberately subjected M. to the risk of HIV infection on March 1, 1992. According to the facts as established by the Commission, during a police interview on March 5, 1992, M. identified X. as the perpetrator, and the police informed her that X.'s spouse, the applicant, was HIV-positive. On April 10, 1992, the police informed M. that X was also HIV-positive.</p>	
Legal position	<p>The ECtHR stated that, as a result of the trial of X., the courts had interfered with the applicant's personal rights. Therefore, it was necessary to analyze whether this intervention was in accordance with the law, whether it pursued a legitimate aim, and whether it was necessary in a democratic society. With regard to the first two components, the ECtHR pointed to their observance by the national courts.</p> <p>As for the necessity of the intervention in a democratic society, the ECtHR noted the following. The general principles on the importance of maintaining the confidentiality of health data are particularly relevant to the protection of the confidentiality of information about HIV infection, the disclosure of which is incompatible with Art. 8 of the Convention, unless it is justified by an overriding requirement in the public interest. State measures disclosing such information without the consent of the patient call for the most careful scrutiny on the part of the ECtHR, as do the safeguards designed to secure effective protection. In such cases, a fair balance must be struck between the interest of the publicity of court proceedings and the interests of a party in maintaining the confidentiality of personal data.</p> <p>(a) Orders requiring the applicant's doctors and psychiatrist to testify were applied because the applicant had the right not to testify against her husband, X. Thus, the national courts aimed to find out whether X. knew or had reason to suspect that he was HIV-positive. This circumstance could have been decisive in classifying his crimes as sexually motivated or attempted murder. Undoubtedly, the public interest in favor of investigating and prosecuting X. for attempted murder significantly limited the applicant's personal rights. However, the ECtHR notes that the proceedings were confidential and extremely exceptional, and the impugned orders hardly prevented potential or actual HIV carriers from undergoing blood tests and seeking treatment. In this respect, the ECtHR did not find a violation of Article 8 of the Convention.</p>	

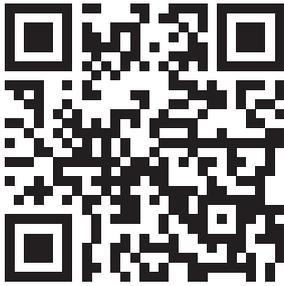
	<p>(b) Seizure of the applicant's medical records and inclusion in the investigation file: these measures were complementary to the said orders; their purpose was the same and based on the same important public interests. Such seizure was authorized by the prosecutor's office and not by the court, but this fact alone could not give rise to any violations, since the conditions of seizure were the same as the conditions for ordering medical workers to testify. The ECtHR had no doubt about the need to attach the said documentation to the case file, and therefore did not find a violation of Article 8 of the Convention.</p> <p>(c) Duration of the order to maintain the confidentiality of the medical data: ten years' term, during which the material of the hearing could not be disclosed, was inconsistent with the interests of the legal debate. Disclosure of confidential information about the applicant's HIV-positive status after the expiration of this period would be unjustified and would constitute a serious interference with her private and family life, which was not supported by compelling reasons. In this aspect, the ECtHR stated that Art. 8 of the ECHR had been violated. In addition, the ECtHR noted that disclosure of the applicant's identity was not justified by any sufficient reasons.</p>
Stated violation (article)	<p>No violation of Art. 8 of the Convention as regards the court's orders to testify concerning the applicant's HIV-positive status by medical workers and the prosecutor's orders to attach the applicant's medical records to the case.</p> <p>Violation of Art. 8 of the Convention regarding the limited duration of a judicial prohibition on disclosure of case files.</p> <p>Compensation: FIM 160,000.</p>

Name, number, link to the judgement	Enhorn v. Sweden (Application No. 56529/00) http://hudoc.echr.coe.int/eng?i=001-68077	
Date of rendering and effective date	January 25, 2005	
Facts	<p>In 1994, the applicant, gay man, discovered that he was infected with HIV and that he had transmitted the virus to a 19-year-old man with whom he had first sexual contact in 1990. On these grounds, a county medical officer issued to the applicant a number of instructions on how to avoid transmitting the disease, including instructing him to inform sexual partners of his HIV status prior to sexual intercourse, as well obliging him to keep several appointments with the county medical officer. As the applicant failed to keep some of these appointments, the county medical officer petitioned a county administrative court for an order on applicant's compulsory isolation. In February 1995 the county administrative court, applying the 1988 Infectious Diseases Act, ordered that the applicant be kept in compulsory isolation for up to three months. The order took effect immediately, but as the applicant failed to report to the hospital, he was taken there by the police in March 1995. The isolation term was repeatedly prolonged every six months. The order on deprivation of liberty was in effect for almost seven years (until 2001).</p> <p>However, as the applicant absconded from the hospital several times, his actual deprivation of liberty lasted around one and a half years in total. The applicant's appeals were dismissed by the administrative court of appeal.</p>	

	<p>Supreme Administrative Court also refused to satisfy the appeal. In 2001, the county administrative court refused a petition for a further prolongation of compulsory isolation. It cited the lack of information regarding the applicant’s whereabouts, behavior and state of health. Since 2002, no information has been available regarding the whereabouts of the applicant, but the county medical officer found that there are no reasons for further prolongation of compulsory isolation.</p>
Legal position	<p>The ECtHR verified that the detention had a basis in national law – the 1988 Infectious Diseases Act – which entrusted the consulting physician with a wide discretion when issuing the practical instructions needed to prevent transmission of the infectious disease. The two essential criteria of assessing the “lawfulness” of the detention were: whether transmission of the infectious disease had been dangerous for public health or safety; and whether detention had been the last resort to prevent transmission of the disease, since less severe measures were not considered as sufficient. It was undisputed that the first criterion had been fulfilled. As to the second, despite the fact that the applicant absconded from the hospital several times, his actual deprivation of liberty lasted around one and a half years in total. The Government had not provided any examples of less severe measures which could have been considered. One of the instructions issued to the applicant (on September 1, 1994) had prohibited him from having sexual intercourse without first informing his partner about his HIV status. The ECtHR noted that there was no evidence or indication that the applicant had transmitted the virus to anybody between February 1995 and December 2001 or that he had engaged in sexual intercourse without first informing his partner of his HIV status during that period. As to the infection of a 19-year-old man in 1990, there was no indication that the applicant had transmitted the virus as a result of intent or gross negligence. He had become aware of his infection only in 1994. In these circumstances, his compulsory isolation had not been the last resort to prevent the transmission of the disease because less severe measures had been considered and found insufficient to safeguard the public interest. By extending the isolation for a period of almost seven years, which resulted in the applicant’s involuntary hospitalization for almost a year and a half, the authorities had failed to strike a fair balance between the need to ensure that the HIV did not spread, and the applicant’s right to liberty.</p>
Stated violation (article)	<p>Violation of Art. 5 of the Convention (para. 1). Compensation: EUR 12,083.</p>

Name, number, link to the judgement	<p>I. v. Finland (Application No. 20511/03) http://hudoc.echr.coe.int/eng?i=001-87510</p>	
Date of rendering and effective date	<p>July 17, 2008 October 17, 2008</p>	
Facts	<p>The case concerned failure to sufficiently protect the medical records of HIV-positive nurse against unauthorized access. The applicant worked as a nurse in a public hospital. As of 1987, she paid regular visits to the infectious diseases clinic at the same hospital, having been diagnosed as HIV-positive. Early in 1992, the applicant began to suspect that her colleagues were aware of her illness. At that time hospital staff had free access to the patient register which contained information on patients’ diagnoses and treatment.</p>	

	<p>Having confided her suspicions to her doctor, the hospital's patient register was amended so that henceforth only the treating clinic's personnel had access to its patients' records. The applicant was registered in the patient register under a false name. Later she complained to the County Administrative Board, requesting it to examine who had accessed her confidential patient record. Upon request, the director in charge of the hospital's archives filed a statement with the County Administrative Board.</p> <p>The statement clarified that it was not possible to find out who, if anyone, had accessed the applicant's patient record as the data system revealed only the five most recent consultations (by working unit and not by person), and even this information was deleted once the file was returned to the archives. The applicant's claim for damages was dismissed by civil courts due to the absence of proper evidence of unlawful actions with regards to her records.</p>
<p>Legal position</p>	<p>The ECtHR observed that the applicant complained that there was a failure on the part of the hospital to guarantee the security of her data against unauthorized access, or, in ECHR terms, a breach of the state's positive obligation to secure respect for her private life by means of a system of data protection rules and safeguards. The protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his/her right to respect for private and family life, as guaranteed by Art. 8 of the ECHR. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the ECHR. It is crucial not only to respect the sense of privacy of a patient but also to preserve his/her confidence in the medical profession and in the health services in general. Information on human HIV infection is particularly relevant in terms of protecting the confidentiality of information, given the sensitive issues surrounding this disease.</p> <p>Domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data that may be in conflict with the safeguards of Art. 8 of the ECHR. The strict application of the law would therefore have constituted a substantial safeguard for the applicant's right secured by Art. 8 of the ECHR, making it possible, in particular, for police access to disclosure of health records strictly. The ECtHR notes that the applicant lost her civil action because she failed to prove on the facts a causal connection between the deficiencies in the access security rules and the dissemination of information about her medical condition.</p> <p>However, imposing such burden of proof on the applicant means ignoring the acknowledged deficiencies in the hospital's record keeping for the period of the investigation. It is clear that had the hospital provided a greater control over access to health records by restricting access to health professionals directly involved in the applicant's treatment or by maintaining a log of all persons who had accessed the applicant's medical file, the applicant would have been placed in a less disadvantaged position before the domestic courts. The ECtHR pointed out that it was crucial is that the hospital's data processing system did not meet the legal requirements contained in Art. 26 of the Personal Data Act, a fact that was not given due attention by the domestic courts. The ECtHR noted that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life.</p> <p>Therefore, practical and effective protection was needed to exclude any possibility of unauthorized access. Such protection was not given in the discussed case.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 8 of the ECHR. Compensation: EUR 8,000 as non-pecuniary damages.</p>

Name, number, link to the judgement	Armonienė v. Lithuania (Application No. 36919/02) http://hudoc.echr.coe.int/eng?i=001-89823	
Date of rendering and effective date	November 25, 2008 November 25, 2009	
Facts	<p>The case concerned insufficient payment of compensation for breach of confidentiality. The biggest Lithuanian daily newspaper published a front-page article on the threat of AIDS in a remote area of Lithuania. In the article, medical workers from the local hospital reported that two residents of this area, Mr. Armonienė and Mrs. Biriuk, were HIV-positive. The article stated that the “notoriously promiscuous” Mrs. Biriuk had two illegitimate children with Mr. Armonienė. Later Mr. Armonienė and Mrs. Biriuk separately sued the newspaper for breach of their right to privacy. In July 2001 and April 2002, the courts ruled in their favor, finding that the article was humiliating, that the newspaper published information on their private life without their consent, and that there was no legitimate public interest in publishing the information. However, in both cases the courts found that it had not been established whether the information was published deliberately. Therefore, they applied a legal provision that limited the maximum possible reward in the absence of an intent to LTL 10,000 (approximately EUR 2,900).</p> <p>The applicant was the wife of the deceased man – Mr. Armonienė – referred to in the article.</p>	
Legal position	<p>The ECtHR believes that the notion of “private life” within the meaning of Art. 8 of the ECHR is a broad concept which includes, <i>inter alia</i>, the right to establish and develop relationships with other human beings and, undoubtedly, personal information relating to a patient. A fair balance has always to be struck between the competing interests of the individual and the community as a whole. The protection of private life has to be balanced, among other things, with the freedom of expression granted by Art. 10 of the ECHR.</p> <p>The information published in the article about the state of health of the applicant’s husband, namely that he was HIV-positive, as well as the allegation that he was the father of two children by another woman who was also suffering from AIDS, was of a purely private nature and therefore fell within the protection of Art. 8 of the ECHR. The ECtHR took particular note of the fact that the family lived not in a city but in a village. This increased the potential impact of the publication, given the possibility that neighbors and the immediate family would learn of the husband’s illness, thereby causing public humiliation and exclusion from the social life of the village.</p> <p>The ECtHR agreed with the finding of the local court, which held that making information about the applicant’s husband’s state of health, indicating his full name, surname and residence, public did not correspond to any legitimate public interest. The ECtHR believes that the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and sufficiently deterring the recurrence of such abuses, failed to provide the applicant with the protection that could have legitimately been expected under Art. 8 of the ECHR. The ECtHR concludes that the state failed to secure the applicant’s right to respect for her family’s private life.</p>	
Stated violation (article)	Violation of Art. 8 of the ECHR. Compensation: EUR 6,500 as non-pecuniary damages.	

Name, number, link to the judgement	Kats and Others v. Ukraine (Application No. 29971/04) http://hudoc.echr.coe.int/eng?i=001-90362	
Date of rendering and effective date	December 18, 2008 March 18, 2008	
Facts	<p>The case concerned the inadequate provision of medical care to the applicants' daughter during her detention, which led to her death, as well as the further ineffective investigation into the circumstances of her death.</p> <p>The applicants maintained that the Ukrainian authorities were responsible for the death of their daughter, since they failed to provide her with adequate health care during her detention or to release her on medical grounds. On her arrival at the SIZO (pre-trial detention facility), she was examined by a doctor and was found to be generally healthy.</p> <p>However, throughout her detention she suffered from various chronic illnesses such as a gastric ulcer, chronic bronchitis, pyelonephritis and other conditions which, exacerbated by her HIV-positive status, required constant medical supervision and appropriate treatment. The father of the deceased sent a letter to the administration of the SIZO seeking to have his daughter hospitalized, since she had been HIV-positive since 1999. The administration, however, refused to transfer the woman to a specialist hospital and failed to move her to the hospital at the SIZO. The report of the forensic medical expert states that she died from diseases complicated by HIV, in particular purulent pneumonia. Immediately after her death, the applicants lodged a complaint to institute criminal proceedings against the SIZO administration for negligence in performing their official duties. According to a report by the Kyiv City Forensic Medical Bureau of November 17, 2006, the doctors at the SIZO incorrectly diagnosed the woman's health problems and this resulted in a failure to provide the appropriate medical treatment; therefore, the death of the applicants' daughter was not directly caused by the actions of the SIZO officials. The investigation authorities refused on three occasions to institute criminal proceedings allegedly due to the absence of evidence that the death had been caused by violence or medical negligence. However, these decisions were subsequently quashed and the case was submitted for further investigation, which is still pending.</p>	
Legal position	<p>Persons in custody are in a particularly vulnerable position and the authorities are responsible for dealing with such persons. Having held that the ECHR requires the state to protect the health and physical well-being of persons deprived of their liberty, in particular, by providing them with the requisite medical assistance, the ECtHR considers that, where a detainee dies as a result of a health problem, the State must offer an explanation as to the cause of death and the treatment administered to the person concerned prior to their death. As a general rule, the mere fact that an individual died in suspicious circumstances while in custody should raise an issue as to whether the state has complied with its obligation to protect that person's right to life. The ECtHR notes that from April 14, 2003, until her death on February 1, 2004, the applicants' daughter remained in custody and, accordingly, under the care of the relevant authorities. Throughout her detention, she suffered from various chronic illnesses exacerbated by her HIV-positive status, meaning she required constant medical supervision and appropriate treatment. Given this finding and the vulnerability of HIV-positive persons to other serious diseases, the ECtHR found the lack of medical attention to her health problems striking. Although she was suffering from numerous serious diseases, her treatment seemed to have been very basic. Moreover, the SIZO administration not only refused to transfer the woman to a specialist hospital, but also failed to move her to the medical wing of the facility.</p>	

	<p>She remained on a general prison wing even after January 22, 2004, when the administration of the SIZO acknowledged the need for her to be admitted to hospital and requested the investigating authorities' permit to release her on medical grounds. The ECtHR notes that according to the report of November 17, 2006 her death was indirectly caused by the inadequate medical assistance provided to her while she was in detention.</p> <p>The ECtHR reiterated that where lives have been lost in circumstances potentially engaging the responsibility of the state, Art. 2 of the ECHR entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or other – so that the legislative and administrative framework set up to protect the right to life has been properly implemented and any breaches of that right have been repressed and punished.</p> <p>In particular, when a detainee dies in suspicious circumstances, an “official and effective investigation” capable of establishing the causes of death and identifying and punishing responsible ones must be carried out at the authorities' own initiative.</p> <p>The system required by Art. 2 must provide for an independent and impartial official investigation that satisfies certain minimum standards of effectiveness. Accordingly, the competent authorities must act with exemplary diligence and promptness, and must initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved. The requirement of public scrutiny is also relevant in this context. Turning to the circumstances of the present case, the ECtHR, due to the principles above, found that a procedural obligation to investigate the circumstances of the death of the applicants' daughter arose under Art. 2 of the ECHR. It considered that the criminal investigation into her death revealed some serious inconsistencies and deficiencies.</p> <p>The ECtHR noted at the outset that the investigation into the applicants' complaints has lasted for four years and nine months so far and, apparently, was still pending at the time of the proceedings before the ECtHR. During this period, the investigating authorities refused to institute criminal proceedings, although these decisions were subsequently quashed by the national courts and the case was submitted for further investigation. Decisions not to institute criminal proceedings were taken before important evidence – the results of the additional inquiry and the additional medical evidence – had been obtained. Both these decisions were strikingly terse and limited to the finding that in the absence of the above evidence there was no indication that the death had been caused by violence or medical negligence.</p> <p>The investigating authorities have never properly addressed the main issue of the applicants' complaints – the quality of the medical treatment provided to the applicants' daughter viewed in the context of the diseases she had been diagnosed with. Moreover, some parts of the investigation did not satisfy the minimum requirement of independence. In particular, a part of the witness evidence, namely the statements of the woman's cellmates, was obtained by the authority directly involved. No attempt was made by the prosecution to interview those persons again or to confirm their statements by any other means. This is especially striking given that the statements appear to be identical although provided by eight different persons. The ECtHR notes that throughout the investigation the applicants were to a large extent excluded from the proceedings. Having no formal status in the proceedings, the applicants were denied access to the file and were never informed or consulted about any proposed evidence or witnesses.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 2 of the Convention (substantive and procedural aspects). EUR 7,000 as non-pecuniary damages to each of the applicants.</p>

Name, number, link to the judgement	Oyal v. Turkey (Application No. 4864/05) http://hudoc.echr.coe.int/eng?i=001-97848	
Date of rendering and effective date	March 23, 2010 June 23, 2010	
Facts	<p>The application was made by members of the Oyal family. The first applicant, a son, was infected with HIV shortly after his birth in hospital as a result of a blood and plasma transfusion purchased by his father. This fact was discovered approximately four months after the transfusion.</p> <p>The authorities found that the infection was caused by the blood transfusion. All other supplies of this donor's blood and plasma were found and destroyed to prevent re-infection.</p> <p>The initial costs of the first applicant's treatment were reimbursed by the Izmir Social Solidarity and Mutual Assistance Fund. As for further regular expenses, the State refused to reimburse these. However, the first applicant was awarded a scholarship to support his education.</p> <p>On May 7, 1997, the applicants filed a complaint with the Public Prosecutor's Office in Izmir. They claimed that they had been provided with contaminated blood and the Ministry of Health had been negligent in conducting the requisite screening and testing in accordance with the relevant domestic legislation. They requested that criminal proceedings be initiated against the doctors and laboratory personnel involved in the transfusion process, as well as against the Director of the Izmir Health Department and the Director of the Kızılay Izmir Branch.</p> <p>Authorities stated that the donated blood had been screened for the HIV, however at that stage the antibodies had not yet been produced in this specific donor's blood. Therefore, it had been impossible to detect HIV in the unit of plasma in question through the routine tests. With this in mind, and relying on the statements given by health personnel and expert opinions in the report by the Ministry of Health on this issue, it was concluded that there was no negligence attributable to the health personnel involved in the transfusion. It was also noted that all around the world, Anti-HIV (ELISA) tests were being used to screen for HIV on the recommendation of the World Health Organization, and that the laboratory in question was not equipped to carry out these tests.</p> <p>The first applicant was not admitted to any school due to his status. The applicants also filed a claim for non-pecuniary damages in the amount of TRY 54,930,703,000, which was granted by the domestic courts.</p>	
Legal position	<p>The ECtHR reiterated that Art. 2 of the Convention does not necessarily require a criminal law remedy in cases of unintentional infringement of the right to life or to personal integrity, involving medical negligence, similar as in the present case. The ECtHR pointed out the need to ascertain whether the Turkish legal system afforded the applicants sufficient and appropriate civil redress.</p> <p>Both the civil and administrative courts ruled that the laboratory was at fault for supplying HIV-infected blood to the first applicant and that the Ministry of Health was also responsible as a result of the negligence of its personnel in the performance of their duties. Both institutions had therefore been held liable for the damage caused to the applicants.</p> <p>Furthermore, the Ankara Civil Court of First Instance established that the HIV-infected blood given to the first applicant had not been detected by the health personnel because they had not done the requisite test on the blood in question, considering that it would be too costly.</p>	

	<p>Moreover, the ECtHR found that, prior to the incident in question, there was no regulation requiring blood donors to give information about their sexual history, which could help determine their eligibility to give blood. On account of these deficiencies, and the defendants' failure to comply with the already existing regulations, the courts awarded the applicants TRY 54,930,703,000 and TRY 15,936,949, respectively, to cover non-pecuniary damages and the statutory interest applied to those sums.</p> <p>Thus, it appears that the applicants had access to the civil and administrative courts, which established the liability of those responsible for the infection of the first applicant with HIV and the award of civil redress, in an order for damages. However, the ECtHR believes that the redress was not sufficient.</p> <p>The non-pecuniary damages received by the applicants only covered one year's treatment and medication for the first applicant. Thus, the family was left in debt and poverty and was unable to meet the high costs of the continued treatment and medication amounting to a monthly cost of almost EUR 6,800, which was not contested by the government. Despite the promises made by the authorities to pay the medical expenses of the first applicant, the applicants' requests to that effect were rejected. The green card given to the applicants was withdrawn immediately after the announcement of the judgements ordering the defendants to pay compensation to the applicants. It follows that the applicants were left on their own to pay the high costs of treatment and medication for the first applicant.</p> <p>In view of the above, while the ECtHR acknowledged the sensitive and positive approach adopted by the national courts in determining the responsibility of the Kızılay and the Ministry of Health and in ordering them to pay damages to the applicants, it considered that the most appropriate remedy in the circumstances would have been to have ordered the defendants, in addition to the payment of non-pecuniary damages, to pay for the treatment and medication expenses of the first applicant during his lifetime. The ECtHR concludes therefore that the redress offered to the applicants was far from satisfactory for the purposes of the obligation under Art. 2 of the Convention.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 2, 6, 13 of the Convention. Compensation: EUR 381,000.</p>

<p>Name, number, link to the judgement</p>	<p>Kiyutin v. Russia (Application No. 2700/10) http://hudoc.echr.coe.int/eng?i=001-103904</p>	
<p>Date of rendering and effective date</p>	<p>March 10, 2011 September 15, 2011</p>	
<p>Facts</p>	<p>The applicant moved from Uzbekistan to Russia in 2002. In 2003, he got married and his child was born. Also in 2003 he filed an application for a Russian residence permit. As a result of his application, the applicant had to undergo a medical examination, during which he tested positive for HIV. His application for a Russian residence permit was refused on this ground.</p>	

Facts	<p>The refusal was upheld by the national courts and by the migration service. The stay of the applicant at the Russian territory was held to be unlawful, since he was unable to confirm his HIV-negative status, so he was subject to deportation. His complaints were rejected first by the District Court, and then by the Regional Court (acting as a court of appeal).</p>
Legal position	<p>The ECtHR stressed that in this case, the applicant's family life had been the subject of interference, since he was officially married to a Russian national, and had relatives in Russia.</p> <p>Regarding the assessment under the Art. 14 of the Convention, ECtHR recalled that in terms of the protection against discrimination, this article only complements the other substantive provisions of the ECHR and the Protocols thereto. It has no independent effect because it acts solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions.</p> <p>The ECtHR emphasized that the list of the prohibited grounds of discrimination set out in Art. 14 of the Convention is not exhaustive, so the HIV-positive status of the applicant might fall under "other grounds".</p> <p>In the context of this case, the ECtHR had to analyze the following: whether the applicant was in an analogous position to other non-nationals, and whether the difference in treatment was objectively and reasonably justified.</p> <p>The ECtHR stated that since the applicant had family ties in Russia, he was eligible to apply for a residence permit, and, therefore, was in an analogous situation to other non-nationals. However, the authorities interfered with this right, which was not justified in the given circumstances. The margin of appreciation of the defendant state in this case is much narrower, as HIV-positive people belong to a vulnerable group that has been stigmatized and discriminated against since the virus first appeared.</p> <p>The government could not justify the different treatment of the applicant compared to other foreigners, given only his HIV-positive status in case of equality of other circumstances.</p> <p>The government justified its refusal to issue a residence permit on the grounds of public health protection. The ECtHR found this aim legitimate, but stated that a fair balance had not been struck between public health interests and the applicant's personal rights, since the presence of an HIV-infected person in the country itself was not a threat to public health.</p> <p>The ban on the entry and/or stay of HIV-positive non-nationals in order to prevent the transmission of HIV was based on the assumption that they would behave dangerously and that citizens would not be unable to protect themselves. This assumption was a generalization that was not based on objective reality, and did not take into account individual situations, such as the situation of the applicant. In support of its position, the ECtHR argued that the restrictions did not apply to short-stay foreign tourists.</p> <p>Taking into account that the applicant belonged to a particularly vulnerable group, that his exclusion has not been shown to have a reasonable and objective justification, and that the contested legislative provisions did not make room for an individualized evaluation, the ECtHR found that the Government overstepped the narrow margin of appreciation afforded in this case. The applicant was therefore a victim of discrimination on account of his health status.</p>
Stated violation (article)	<p>Violation of Art. 8 in conjunction with Art. 14 of the Convention. Compensation: EUR 15,000 as non-pecuniary damages, and EUR 350 as costs and expenses.</p>

Name, number, link to the judgement	I.B. v. Greece (Application No. 552/10) http://hudoc.echr.coe.int/eng?i=001-127055	
Date of rendering and effective date	October 3, 2013 January 3, 2014	
Facts	<p>In February 2005, while he was on annual leave, the applicant learnt that he had contracted HIV. This information spread among his co-workers, who started complaining to their employer about having to work with a colleague who was HIV-positive. Consequently, they demanded his dismissal. The employer invited a medical practitioner to talk to the staff about HIV and how it could be transmitted. The doctor attempted to reassure the staff by explaining what precautions could be taken. Despite that fact, approximately half of the staff members sent the applicant's employer a letter asking to dismiss their HIV-positive colleague in order to "preserve their health and their right to work", claiming that the harmonious atmosphere in the company may deteriorate, if their requirements were not met. Two days before the end of applicant's, the employer dismissed him and paid him the compensation according to the Greek law. The applicant brought proceedings in the courts. The court of first instance decided in favor of the employer, and the court of appeal – in favor of the applicant. The Court of Cassation quashed the Court of Appeal's judgement, ruling that the employee was dismissed lawfully, and the employer acted within the confines of the law.</p>	
Legal position	<p>ECtHR stressed that the applicant's situation had to be compared to that of the other employees at the company because this was relevant to an assessment of his complaint based on a difference in treatment. It was clear that the applicant had been treated less favorably than any of his colleagues and that this situation had occurred solely because of his HIV-positive status. Ignorance about how the disease spreads had bred prejudices which, in turn, had stigmatized or marginalized those infected with the virus. Hence, the ECtHR believed that people living with HIV were a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that singled out that group for differential treatment on the basis of their HIV status. However, the applicant's employer had terminated his contract owing to the pressure exerted by the employees, who had learnt that the applicant was HIV-positive and feared for their own health. Moreover, the employees of the company had been informed by the doctor that their working relations with the applicant did not expose them to any risk of infection.</p> <p>The Court of Appeal had expressly recognized that the applicant's HIV status did not affect his capacity to do his job and did not indicate that he would be unable to fulfil his contract properly, which would have justified its immediate termination. It had also recognized that the company's very existence had not been threatened by the pressure exerted by the employees. Implicit or explicit prejudice on the part of employees could not be relied on as a pretext for terminating the contract of an HIV-positive employee. In such cases, the need to protect the employer's interests had to be balanced very carefully against the need to protect the interests of the employee, who was the weaker party to the contract, particularly where the latter was HIV-positive. However, the Court of Cassation had not weighed up all the competing interests as carefully and thoroughly as the Court of Appeal. On rather cursory grounds, having regard to the importance and unusual nature of the issues raised by the case, it had held that the dismissal was entirely justified on the ground of the employer's interests, in the proper sense of the term, because the measure had been imposed in order to restore peace in the company and ensure that it continued to operate smoothly.</p> <p>Although the Court of Cassation had not contested the fact that the applicant's HIV status had not adversely affected his ability to perform his employment contract, it had nonetheless based its decision, justifying the employees' fears, on a manifestly inaccurate premise, namely, that the applicant's illness was "contagious".</p>	

	In so doing, the Court of Cassation had ascribed to the smooth operation of the company the same meaning that the employees had wished to give it, thus aligning that definition with the employees' subjective perception. Lastly, the stakes involved for the applicant before the Court of Cassation had been limited to obtaining compensation as awarded him by the Court of Appeal, as his initial claim for reinstatement in the company had been dismissed both by the Court of First Instance and the Court of Appeal. Also, the Court of Cassation had not adequately explained why the employer's interests had prevailed over those of the applicant and had failed to weigh up the rights of the two parties in a manner required by the Convention.
Stated violation (article)	Violation of Art. 14 of the Convention in conjunction with Art. 8. Compensation: EUR 14,339.

Name, number, link to the judgement	S.J. v. Belgium (Application no. 70055/10) http://hudoc.echr.coe.int/eng?i=001-153361	
Date of rendering and effective date	March 19, 2015 (striking out)	

Facts

On July 30, 2007, when the applicant, a Nigerian national, was eight months pregnant, she lodged an application for asylum in which she stated that she had fled her country after the family of the child's father had tried to put pressure on her to have an abortion. In May 2010 the Commissioner General for Refugees and Stateless Persons rejected the asylum application because of inconsistencies in the applicant's account. That decision was upheld by the Aliens Appeals Board.

The applicant was diagnosed as HIV positive in August 2007 and has been undergoing treatment since that time.

In the meantime the applicant lodged an application for leave to remain on medical grounds which was rejected on the basis that she could be treated in Nigeria. An order to leave the country was served on her. The applicant lodged a request under the extremely urgent procedure for a stay of execution of the measure, together with an application to set aside the decisions in question.

The request for a stay of execution was rejected by the Aliens Appeals Board. The applicant lodged an appeal on points of law with the Conseil d'État against the judgment of the Aliens Appeals Board, alleging that the risk of serious and irreversible harm in the event of her return to Nigeria, and the presence of her two young children – born in April 2009 and November 2012 – had not been specifically taken into consideration, and that appeals to the Aliens Appeals Board were ineffective. On December 24, 2010, the time-limit for leaving the country was extended by the Aliens Office for one month. On January 6, 2011, the Conseil d'État declared the appeal against the Aliens Appeals Board judgment inadmissible.

In a judgment of February 27, 2014, a Chamber of the ECtHR held unanimously that there had been a violation of Art. 13 taken in conjunction with Art. 3, as the applicant had not had an effective remedy in the sense of one which had automatic suspensive effect and by which she could obtain an effective review of her arguments alleging a violation of Art. 3 of the ECHR, given that applications to the Aliens Appeal Board to set aside an order to leave the country or a refusal of leave to remain did not suspend enforcement of the removal order.

	<p>The Chamber further held by a majority that enforcement of the decision to deport the applicant to Nigeria would not entail a violation of Art. 3. It held unanimously that, even supposing that the ECtHR had jurisdiction to examine the complaint of a violation of Art. 8, there had been no violation of that provision.</p> <p>On 7 July 2014 the case was referred to the Grand Chamber at the request of the Government and the applicant.</p>
Legal position	<p>In August 2014 the ECtHR received a proposal for a friendly settlement from the Government, in which the latter stressed the strong humanitarian considerations weighing in favour of regularising the applicant's residence status and that of her children.</p> <p>In September 2014 the applicant decided to accept the proposal made by the Belgian State, subject to three conditions: that she and her three children be granted unconditional and indefinite leave to remain, that she be awarded compensation in an amount of EUR 7,000 in respect of the pecuniary and non-pecuniary damage she had sustained, and that the residence permit be issued to her in person. The Government informed the ECtHR that they agreed to the conditions stipulated by the applicant, and on January 6, 2015 the applicant and her children were issued with residence permits granting them indefinite leave to remain.</p> <p>The ECtHR further considered that the settlement was based on respect for human rights as defined in the ECHR and its Protocols.</p>
Stated violation (article)	-

Name, number, link to the judgement	<p>Sergey Antonov v. Ukraine (Application no. 40512/13) http://hudoc.echr.coe.int/eng?i=001-157970</p>	
Date of rendering and effective date	<p>October 22, 2015 January 22, 2016</p>	
Facts	<p>In 2012 the applicant, who was serving a prison sentence and had been diagnosed with HIV, complained that he had not received adequate medical assistance in detention, in particular, antiretroviral therapy (ART) treatment after his arrest. He also complained that he had been intimidated by the pre-trial detention centre authorities and their medical staff in order to induce him to make statements that the medical assistance he had received had been adequate and that possible shortcomings such as the absence of ART had to be imputed to the applicant himself.</p> <p>After a meeting with his lawyer, the applicant unsuccessfully complained about the alleged pressure to the prosecutor's office.</p>	
Legal position	<p>The Government had provided a handwritten note signed by the applicant stating that he had no complaints about the medical staff, in contradiction of his submissions before the ECtHR, both before and after the date on the note. The Government had not specified the circumstances in which the note had been obtained. However, the ECtHR was concerned that it had been obtained ten days after the ECtHR had invited the Government under Rule 39 of the Rules of Court to ensure that the applicant was provided with the appropriate medical assistance.</p>	

	<p>The Government had further submitted that the applicant's allegations about psychological pressure on him had been duly checked and had not proved true. The ECtHR, however, noted that the applicants' complaints had been transferred by the prosecutor to the prison authorities, whose subordinates had been suspected of intimidating the applicant. Furthermore, all the evidence submitted by the Government had originated either from the prison staff or from the applicant's fellow inmates, who had been under the control of the prison authorities. The ECtHR was therefore not convinced by the Government's arguments.</p> <p>Given the applicant's consistent submissions and in the absence of any other credible explanation about the origin of the handwritten note, the ECtHR accepted that the applicant had indeed been approached by the authorities to induce him to make statements which would undermine his application before the ECtHR. In these circumstances it found that the State had failed to fulfil its obligation not to hinder the effective exercise of the right of individual petition.</p> <p>The ECtHR also found unanimously a violation of Art. 3 on account of the inability of the pre-trial detention centre authorities to promptly diagnose the applicant's condition and to provide prompt and comprehensive medical assistance, which amounted to inhuman and degrading treatment and a violation of Art. 13 on account of the lack of an effective and accessible remedy under domestic law for the applicant's complaint in respect of the lack of appropriate medical assistance.</p>
Stated violation (article)	Violation of Art. 3, 13 and 34 EUR 7,000 in respect of non-pecuniary damage.

Name, number, link to the judgement	Novruk and others v. Russia (Applications nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14) http://hudoc.echr.coe.int/eng?i=002-10909	
Date of rendering and effective date	March 15, 2016 June 15, 2016	
Facts	Between 2008 and 2012 the five applicants applied for a temporary residence permit in Russia but their applications were rejected, in accordance with the applicable domestic law, on the grounds that they had been diagnosed HIV-positive. Their appeals were unsuccessful.	
Legal position	<p>The first three applicants were married to Russian citizens and their children had acquired Russian nationality by birth. As to the fifth applicant, he had lived with his same-sex partner since 2007. Despite the domestic courts' refusal to recognise that their relationship amounted to a family or at least a social link, the ECtHR was satisfied that the couple had been living in a stable <i>de facto</i> partnership falling within the notions of both private and family life. The fourth applicant had joined her sister and her son who lived in Russia permanently, shared household expenses with her son's family and did not have friends or relatives outside Russia. Her situation was thus covered by the notion of private life. The facts of the case therefore fell within the ambit of Art. 8 of the ECHR. Since a distinction made on account of an individual's health status, including HIV infection, was covered by the term "other status", Art.14 taken in conjunction with Art. 8 was applicable.</p> <p>The ECtHR further noted that the authorities had based their refusal to grant the applicants a residence permit only on the grounds of their HIV-positive status.</p>	

	<p>As to whether the difference in treatment was objectively and reasonably justified, the ECtHR first noted that at international and national levels there had been a marked improvement in the situation of people living with HIV as regards restrictions on their entry, stay and residence in a foreign country. Since the expulsion of HIV-positive individuals did not reflect an established European consensus, and had no support in other member States, the respondent State was under an obligation to provide a particularly compelling justification for the differential treatment of the applicants.</p> <p>Unlike the position in <i>Ndangoya v. Sweden</i>, the applicants in the instant case had not been suspected of, or charged with, having unprotected sexual intercourse with others without disclosing their HIV-positive status. As to the fifth applicant, the domestic authorities had deduced an increased risk of unsafe behaviour on his part from his refusal to name his former partners, despite the fact that (a) he had told the authorities that he had disclosed his HIV status to his previous partners and (b) he was living in a stable relationship. Thus, the alleged risk of unsafe behaviour on his part had amounted to mere conjecture unsupported by facts or evidence.</p> <p>Finally, the decisions declaring the presence of the third to fifth applicants undesirable set no time-limit on their exclusion from Russian territory. As they had been issued in connection with their infection with HIV, which was by today's medical standards a lifetime condition, they had the effect of a permanent ban on their re-entry to Russia, which was disproportionate to the aim pursued.</p> <p>In the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on the entry, stay and residence of HIV-positive non-nationals, who constitute a particularly vulnerable group, the ECtHR found that the respondent State had not advanced compelling reasons or any objective justification for their differential treatment.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 14 in conjunction with Art. 8 of the ECHR.</p> <p>Compensation: EUR 15,000 to each applicant in respect of non-pecuniary damage; EUR 2,000 to Mr Novruk, EUR 4,000 to Ms Kravchenko, EUR 4,320 to Mr Khalupa, EUR 850 to Ms Ostrovskaya, and EUR 850 to Mr V.V.</p>

<p>Name, number, link to the judgement</p>	<p>Ustinova v. Russia (Application No. 7994/14) http://hudoc.echr.coe.int/eng?i=001-168370</p>	
<p>Date of rendering and effective date</p>	<p>November 8, 2016 March 6, 2017</p>	
<p>Facts</p>	<p>The applicant, who is a citizen of Ukraine, moved to Russia in the early 2000's. The case concerned the decision to deny the re-entry of Mrs. Ustinova to Russia due to her HIV-positive status. The applicant was married to a Russian national.</p> <p>In March 2013, Mrs. Ustinova and her two children (her son from the second marriage, who was a citizen of Russia, and her daughter from a previous marriage) were not allowed to re-enter Russia after a visit to Ukraine, based on the decision of the Consumer Protection Authority issued in June 2012. As a result, she was forced to stay in Ukraine with her daughter, while her 8-month-old son remained in the care of her husband in Russia. It subsequently turned out that the basis for the exclusion order was that during her pregnancy in 2012, Mrs. Ustinova had tested positive for HIV.</p>	

	<p>Her husband challenged the decision before the Tsentralnyi District Court in Sochi and Krasnodar Regional Court, but both rejected the claim, upholding the decision of the Consumer Protection Authority and stating that Mrs. Ustinova's presence in Russia would create a threat to public health. Statements of appeal filed with the Krasnodar Regional Court and subsequently with the Supreme Court were also dismissed.</p> <p>In March 2015, Mrs. Ustinova filed a petition with the Constitutional Court against the relevant migration laws. The court held that these laws are incompatible with the Russian Constitution; it based its findings on the statement that HIV does not create any risk to public health. The applicant's husband applied to the Tsentralnyi District Court in Sochi for reconsideration of its prior judgement on account of the new case law of the Constitutional Court, but his application was dismissed.</p> <p>Mrs. Ustinova's husband subsequently appealed to the Krasnodar Regional Court, and in October 2015 it ruled that the impugned decision was illegal, and the court ordered the local authorities to rectify Mrs. Ustinova's situation.</p> <p>Though Mrs. Ustinova had only been able to re-enter Russia by crossing the border between Ukraine and Belarus, as there were no controls on the Belarus-Russia border, her name obviously was not definitively deleted from the list of undesirable individuals maintained by the Border Control Service.</p>
<p>Legal position</p>	<p>The ECtHR reaffirmed that a state is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of non-nationals into its territory and their residence there. Where immigration is concerned, Art. 8 cannot be considered as imposing a general obligation on a State to respect the choice of the country of their matrimonial residence made by married couples and to authorize family reunion on its territory. However, the removal of a person from a country where close family members are living may amount to an infringement of the right to respect for family life, as granted by Art. 8 § 1 of the Convention. Where children are involved, their best interests must be taken into account and national decision-making bodies have a duty to assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non national parent.</p> <p>The Russian authorities pronounced the applicant's presence in Russia undesirable and she was denied re-entry into Russia in early 2013. As a consequence, she has not been able to continue living with her husband and their child in Russia, disrupting her family life there. The ECtHR considers that the measures taken by the Russian authorities constituted an interference with Mrs. Ustinova's right to respect for her family life.</p> <p>The legal framework and practice for issuing exclusion orders under domestic law did not give an adequate degree of protection against arbitrary interference, because the executive agency could take such decisions without hearing the foreign national concerned and without giving specific reasons or mentioning certain facts that may have rendered the individual's presence in Russia undesirable.</p> <p>The ECtHR noted that the applicant was not informed about the institution of proceedings leading to her exclusion from Russia, that she was not allowed to express her point of view in any form prior to the adoption of the exclusion order, and that the information upon which her contemplated exclusion had to be based was not communicated to her.</p> <p>The ECtHR found that the provisions of Russian law pronouncing the presence of HIV-positive non-nationals undesirable were of an imperative nature, leaving no room for an individualized assessment of the facts in a particular case. The only element that should have been verified was the medical evidence of the person's infection with a communicable disease.</p> <p>The ECtHR emphasizes that a decision based on a predetermined classification of an entire group of vulnerable individuals – people living with HIV – as a threat to public health solely because of their condition, without assessment of their individual situations, cannot be considered compatible with the requirements of the ECHR.</p>

	<p>The ECtHR also draws attention to the improper consideration of the applicant’s case by Russian courts. First, they applied a formalistic and uninquisitive approach, considering themselves bound by the assessment made by the Consumer Protection Authority and failing to provide the reasoning for keeping this assessment unchanged. Both applications for a cassation review, addressed first to the Regional Court and later to the Supreme Court, were dismissed without addressing the detailed legal arguments relating to the established case law of the Constitutional Court and the ECHR. The Russian courts did not attempt to perform any balancing exercise conforming with the ECtHR’s case-law. The ECtHR found that, despite having the formal option to seek judicial review of the actions of the relevant authorities, the applicant was not afforded a sufficiently thorough review by a national authority offering the requisite procedural safeguards against arbitrariness on the part of the State.</p> <p>The ECtHR considered that neither the procedure employed by the executive agency for issuing the exclusion order, nor the subsequent judicial review gave the applicant the requisite degree of protection against arbitrariness, which was inherent in the concept of lawfulness within the meaning of the ECHR.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 8 of the ECHR. Compensation: EUR 15,500.</p>

<p>Name, number, link to the judgement</p>	<p>Karakhanyan v. Russia (Application No. 24421/11) http://hudoc.echr.coe.int/eng?i=001-171094</p>	
<p>Date of rendering and effective date</p>	<p>February 14, 2017 May 14, 2017</p>	
<p>Facts</p>	<p>The applicant’s husband (Mr. Grabarchuk) died in May 2010 while serving an 11-year prison sentence for robbery. The ensuing autopsy showed that he had died from HIV and TB. Mr. Grabarchuk had been diagnosed with HIV after his arrest and detention in a remand prison in 2003. He was subsequently also diagnosed with TB and transferred for seven months in 2009 to a prison hospital for treatment. According to records in his medical file (not apparently signed by him), treatment for his TB was stopped between March 22, 2010, and April 13, 2010, and he did not receive antiretroviral therapy for his HIV from March 13, 2010 until his death. The Government stated that treatment had been interrupted because Mr. Grabarchuk had refused it. His wife, on the other hand, claims that although her husband, who had been misdiagnosed during his detention and lost faith in the doctors treating him, had refused to follow certain recommendations, he had persistently requested to have the HIV treatment altered rather than cancelled. His health drastically deteriorated in May 2010 and he died in the prison hospital, despite his wife’s attempts to have him transferred to a civilian hospital. A criminal inquiry was carried out into Mr. Grabarchuk’s death. The investigating authorities obtained the autopsy report and questioned two doctors who had treated him, but in October 2011, they refused to start a criminal case. The domestic courts subsequently overruled that decision, finding that the investigators had failed to address Mr. Grabarchuk’s wife’s allegation of deliberate indifference to her husband’s medical condition, and ordered a further investigation to address that shortcoming. However, no investigation has apparently since followed.</p>	

<p>Legal position</p>	<p>The ECtHR stated that the authorities were responsible for Mr. Grabarchuk's death because of their failure to provide him with vital, comprehensive and adequate medical care, violating the positive obligations of the state according to Art. 2 of the Convention. At the same time, the ECtHR emphasizes that the applicant's husband died while remaining in custody and, thus, under the authorities' control. The authorities were required to do everything reasonably possible, in good faith and in a timely manner, to try to avert the fatal outcome of this case.</p> <p>In that respect, the absence of Mr. Grabarchuk's signature on the paperwork confirming refusal from treatment, as well as his and his wife's persistent requests to have the HIV treatment altered, cast serious doubt on the genuineness of the alleged refusal. The ECtHR stated that an individual cannot exercise his/her right to refuse medical treatment properly, if he/she does not have sufficient information about the consequences that the refusal might entail. In the absence of such knowledge, a reasoned decision about whether to accept or reject treatment is not possible.</p> <p>In light of the above, the ECtHR concluded that the applicant's husband was deprived of life-saving treatment without sufficient grounds. It also noted that even when the patient's condition became critical, he was not asked again about resuming HIV treatment.</p> <p>The authorities also violated the procedural aspect of Art. 2 of the ECHR due to a failure to carry out an effective investigation in this Case.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 2 of the Convention. Compensation: EUR 24,000.</p>

Tuberculosis and human rights in the European Court of Human Rights case law

In regard to the rights of persons with TB, the ECtHR emphasizes the lack of appropriate conditions of detention and medical care for persons suffering from TB in prisons. Such situations are caused, in particular, by a lack of necessary medicines, specially equipped premises and medical workers in penitentiaries, and delays in starting treatment. In cases concerning Ukraine, the ECtHR has repeatedly noted that our country has among the highest rates of reported TB treatment failure. The reasons for the transmission of drug-resistant TB are: constant lack of medicines and lack of access to complete treatment regimens, especially in places of detention. The ECtHR also emphasizes the lack of any legal framework to provide palliative care in penitentiaries.

Thus, considering the cases of the persons' living with TB rights violation, the ECtHR found a violation of Art. 2 and 3, 13 of the Convention.

The right granted by Art. 3 of the ECHR – prohibition of torture, inhuman or degrading treatment or punishment – is absolute and cannot be subject to any restrictions by the State.

In cases concerning assessment of the rights of persons with TB, the ECtHR calls on states to assess comprehensively the important factors that are crucial for determining the presence or absence of human rights violations, namely: the state of health of the person (for the need to provide medical care), the appropriateness of imprisonment in view of this condition; and the adequacy of medical aid and care provided in the conditions of imprisonment.

Detailed legal positions on each issue are presented in Table 2. In addition to these cases, the relevant subject matter is also addressed in the ECtHR's judgement in the Case of *Karakhanyan v. Russia*, analysed in the previous section.

Table 2.
ECtHR legal positions in cases involving persons with TB

Name, number, link to the judgement	Melnyk v. Ukraine (Application No. 72286/01) http://hudoc.echr.coe.int/eng?i=001-72886	
Date of rendering and effective date	March 28, 2006	
Facts	The applicant was sentenced to imprisonment for a drug-related crime in September 2000. Medical examinations carried out in the prison's medical unit found him to be generally healthy. In one month, he was transferred to another prison, where he did not undergo the mandatory medical examination for possible TB. In April 2001, he complained to the prison doctor that he was experiencing shortness of breath and was coughing up phlegm. After being misdiagnosed with lung cancer twice, he was transferred to a TB hospital for prisoners in June 2001. In March 2004, he was diagnosed with curable TB.	

	<p>The applicant complained, <i>inter alia</i>, that he did not receive the necessary medical treatment and assistance for TB. He argued that he was detained in dirty and overcrowded cells, held together with prisoners who had TB and AIDS. He argued that the prisoners had to sleep on metal bunk beds in turns, had no access to daylight and fresh air, and were not provided with appropriate nourishment. In addition, the special trains for transporting detainees were overcrowded, had no access to daylight or adequate supplies of drinking water. There was not provided any food other than some bread and water.</p>
Legal position	<p>The ECtHR noted that the applicant was diagnosed as having contracted TB almost two and half months after he first complained about his health condition. The incorrect provisional diagnoses confirmed the applicant's claims as to the inadequacy of the medical care provided and the failure to detect his TB rapidly, or to isolate him and provide him with adequate and timely treatment. Furthermore, he did not undergo the required medical checks for possible TB upon arrival to another penitentiary. His health only started improving in October 2001, and his lengthy treatment led to side-effects, such as sight impairment and dizziness. The applicant was not provided with adequate or timely medical care, given the seriousness of the disease and its consequences for his health.</p> <p>The ECtHR also noted that the conditions of hygiene and sanitation in the penitentiary were unsatisfactory and would have contributed to the deterioration of the applicant's poor health. Such conditions must have caused him considerable mental and physical suffering, diminishing his human dignity.</p> <p>The ECtHR also noted that the applicant did not have at his disposal an effective domestic remedy for the violation of his rights by the state.</p> <p>In this and similar cases the ECtHR calls on states to assess comprehensively the important factors that are crucial for determining the presence or absence of human rights violations, namely: the state of health of the person (for the need to provide medical care), the appropriateness of imprisonment in view of this condition, and the adequacy of medical aid and care provided in the conditions of detention.</p>
Stated violation (article)	<p>Violation of Art. 3 and Art. 13 of the Convention. Compensation: EUR 10,000.</p>

Name, number, link to the judgement	<p>Yakovenko v. Ukraine (Application No. 15825/06) http://hudoc.echr.coe.int/eng?i=001-82987</p>	
Date of rendering and effective date	<p>October 25, 2007 January 25, 2008</p>	
Facts	<p>The case concerned the inability to provide adequate medical care to the applicant, and ill-treatment he was subjected to during transportation to a temporary detention center. The applicant, Oleh Yakovenko, was arrested on suspicion of burglary. He argued that he had confessed to the crime only because he had been subjected to illegal methods of investigation in custody.</p>	

	<p>The applicant noted that the conditions in which he had been transported from the Simferopol SIZO to the Sevastopol temporary detention center, had been degrading. The applicant claimed that during the journey he was held for 36 hours in a crowded section of the vehicle being used to transport prisoners, or to huddle in a crowded compartment with almost no access to natural light or fresh air for 48 hours. In addition, he was not given food or drink during such journeys. In fact, the applicant's health began to deteriorate during the journey, but he was unable to access medical care during his stay at the Sevastopol temporary detention center as there was no medical workers among the temporary detention center staff.</p> <p>The applicant claimed that he was diagnosed with HIV-positive status and TB on February 21, 2006, during visits to the medical room. Although the SIZO officials were aware of the test results, they failed to inform the applicant about it until April 20, 2006. Despite his deteriorating health, he was not hospitalized.</p> <p>The applicant's mother lodged a complaint with the Prosecutor-General, stating that the administration of the Sevastopol temporary detention center had unlawfully refused to hospitalize her son. Finally, on April 28, 2006 the applicant was admitted to the Sevastopol City Infectious Diseases Hospital. This happened by order of the ECtHR in the context of the application of emergency measures under Rule 39 of the Regulations of the ECtHR. On May 8, 2007, Oleh Yakovenko died.</p>
<p>Legal position</p>	<p>The ECtHR reiterates that the authorities are under an obligation to protect the health of persons deprived from liberty. The lack of appropriate medical care may amount to treatment contrary to Art. 3 of the ECHR.</p> <p>As regards the medical care, the applicant complained that he had not received adequate medical assistance for his HIV and TB. Although the prison authorities learned about his diagnosis in February, no medical measures were taken.</p> <p>The applicant was not brought before an infectious diseases doctor, nor was any monitoring for opportunistic infections afforded to him. The authorities stated that the absence of a doctor or paramedic among the staff members of the Sevastopol temporary detention center was compensated by the possibility of calling an ambulance every time the applicant's health condition warranted medical intervention.</p> <p>The ECtHR recalled in this respect that the Sevastopol temporary detention center administration had to give permission for an ambulance to be called, a difficult decision to take in the absence of professional medical advice. In addition, the equipment in the ambulance which was called was manifestly inadequate to establish a definitive diagnosis and the doctor proposed that the applicant be sent to a specialist hospital for further examination; however, the authorities refused to do this. The applicant was later examined at the Infectious Diseases Hospital.</p> <p>In view of the letter from this establishment's head doctor, the ECtHR cannot accept the authorities' contention that the doctors did not recommend the applicant's hospitalization. However, the applicant was transferred to the Anti TB Healthcare Centre only following the ECtHR's request made under Rule 39 of the Rules of ECtHR. In the ECtHR's view, the failure to provide timely and appropriate medical assistance to the applicant amounted to inhuman and degrading treatment within the meaning of Art. 3 of the ECHR.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 3 of the ECHR. Compensation: EUR 10,000 as non-pecuniary damages.</p>

Name, number, link to the judgement	Pokhlebin v. Ukraine (Application No. 35581/06) http://hudoc.echr.coe.int/eng?i=001-98798	
Date of rendering and effective date	May 20, 2010 August 20, 2010	
Facts	<p>The applicant stated that he had contracted TB in June 2004 when he was being held in a cell of the Kyivskiy District Police Department in Simferopol.</p> <p>In November 2004, in the course of the applicant's pre-trial detention, a medical commission issued a report confirming that he was suffering from AIDS (since 1997), bronchial TB (since 2004), chronic hepatitis, and candidiasis. The commission further concluded that the medical treatment provided to the applicant in the detention facility had been ineffective. For this reason, the applicant's prison sentence was commuted to a non-custodial sentence and on December 24, 2004, the applicant was released.</p> <p>In February 2005 the applicant underwent a medical examination following which he was designated as Category 2 (medium-level) disabled, on account of his illnesses.</p> <p>During the applicant's detention in the Simferopol temporary detention center (between November 16, 2005, and July 20, 2006) the applicant was provided with medical treatment for his illnesses by the medical staff of that facility. As of February 2006, the applicant started to complain of numbness in the legs.</p> <p>On July 20, 2006, the applicant was transferred from the Simferopol temporary detention center to the Simferopol SIZO where he continued to undergo medical treatment.</p> <p>On August 11, 2006, the applicant was moved to the hospital at the Daryivka no. 10 Prison, where he was provided with medical assistance till September 7, 2006. By the end of that period, the applicant was still suffering from TB, which at that time had affected his left lung, as well as all the other above-mentioned illnesses. In addition, he had been diagnosed with toxic polyneuropathy and other less serious illnesses. The medical staff therefore concluded that the applicant's subsequent therapy needed to be reviewed. Between September 7, 2006, and January 30 2007, the applicant was held in the Simferopol SIZO, the Sofiyivka no. 45 Prison, and the Dnipropetrovsk Pre-Trial Detention Centre, where the medical staff continued providing treatment to the applicant in respect of his multiple illnesses.</p> <p>On January 30, 2007, following a further deterioration of the applicant's health, he was returned to the hospital at the Daryivka no. 10 Prison where he was held till March 14, 2007. Following his arrival, the applicant was diagnosed with all the above-mentioned illnesses, and additionally with spinal TB, acute maxillary sinusitis and chronic periodontitis. At the end of the applicant's detention in that facility all the illnesses remained and the applicant was also underweight.</p> <p>Between March 14 and December 21, 2007, the applicant was held in the hospital at the Hola Prystan no. 7 Prison, where he was provided with specific treatment for TB and AIDS. During that period, the spinal TB progressed to the point that the applicant became unable to walk on his own. According to the authorities, during that period the applicant refused the prescribed medical treatment. They referred to the report prepared by the medical staff on May 23, 2007, documenting the applicant's refusal.</p> <p>On June 6, 2007, the medical commission, having regard to the deterioration of the applicant's health, recommended that he be granted an early release.</p> <p>Following his release on December 21, 2007, the applicant underwent medical examination and was designated as Category 1 (the highest level) disabled because of his illnesses.</p>	

<p>Legal position</p>	<p>The ECtHR noted that the applicant’s poor health, in particular the fact that he was suffering from AIDS, TB, chronic hepatitis and candidiasis, called for special medical care on a regular, systematic and comprehensive basis.</p> <p>The ECtHR accepted that certain kinds of medical treatment were provided to the applicant in the detention facilities and the prison hospitals, but observed that during the time the applicant spent in detention his health significantly deteriorated, and he acquired a number of new conditions such as occasional leg numbness, toxic polyneuropathy, acute maxillary sinusitis, chronic periodontitis, and weight loss. Furthermore, the applicant’s TB became so much worse that it affected his spine, following which the applicant – for a certain period of time – became unable to walk on his own.</p> <p>Analyzing the contention of the authorities that the applicant could be reproached for refusing to undergo medical treatment in May 2007, the ECtHR noted that the refusal was at the later stage of the applicant’s detention, when his spinal TB and all the other newly acquired conditions had already been diagnosed and when all the previous lingering therapeutic programmes failed to be effective, so the responsibility for his health deterioration could be shifted from the authorities to the applicant.</p> <p>The ECtHR further noted that the applicant was granted early release because of the deterioration of his health, and that following his release he was designated as Category 1 disabled, which was the highest category under domestic rules.</p> <p>Accordingly, given the seriousness of the applicant’s illnesses and also to the domestic law requirement providing that prisoners suffering from TB should be held in specialized prison hospitals, the ECtHR considered that the measures taken by the domestic authorities were not sufficient.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 3 of the ECHR. Compensation: EUR 7,000 as non-pecuniary damages.</p>

<p>Name, number, link to the judgement</p>	<p>Makshakov v. Russia (Application No. 52526/07) http://hudoc.echr.coe.int/eng?i=001-163101</p>	
<p>Date of rendering and effective date</p>	<p>May 24, 2016 August 24, 2016</p>	

<p>Facts</p>	<p>The case concerned the conditions of detention and medical services provided to a prisoner with TB. The applicant was convicted in May 2007. Shortly after imprisonment, he was sent to the prison hospital after being diagnosed with TB. His complaint concerned overcrowding, poor lighting and ventilation, and poor sanitation during his hospital stay from March to October 2007. He also argued that he had contracted TB in detention, and had not received regular and systematic treatment. In particular, he had not received any special anti-TB therapy in his initial period of hospitalization between March 2007 and March 2008; instead, he had only been given basic febrifuges and painkillers. He argued that during this period, the medicines prescribed had often been out of stock. However, from late 2009 to late 2010, his condition was brought under control. He filed numerous complaints with various authorities from 2006 to 2010, which were rejected.</p>
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Legal position	<p>While analyzing the applicant's allegation that he had been infected with TB during his detention, the ECtHR notes that even if this information was true, it would not itself constitute a violation of Art. 3 of the ECHR, provided that he was receiving appropriate treatment after that. Also, various factors may influence the progress of the disease, that is why all circumstances of the case in aggregate should be studied.</p> <p>Although at that time his disease was at the initial stage and was not chronic, it took more than seven years to bring it under control.</p> <p>Since the national authorities did not provide information on the applicant's treatment in the period between March 2007 and March 2008, the ECtHR accepted the applicant's argument that he received no special anti TB therapy. The authorities' inability to ensure a regular, uninterrupted supply of essential anti-TB drugs to patients is a key factor in TB treatment failure. Also, the applicant was not tested for drug resistance, which was necessary to choose an appropriate treatment regimen, given the length of the treatment, its occasional interruptions and lack of clear signs of improvement in the applicant's condition for a significant period of time.</p> <p>The ECtHR emphasized that the interruptions initiated by the applicant were insignificant in this case, since such treatment proved to be ineffective given that it had no prospects of success. The ECtHR believes that the applicant's decision to interrupt the treatment was no more than a legitimate attempt to draw the attention of the state to the poor quality of the medical care that he was receiving. Since the interruption occurred more than a year and a half after the initiation of the therapy and lasted less than a month, it could not have significantly impacted on the quality of the treatment.</p> <p>The ECtHR states that the long period of the applicant's disease was caused by the absence of any therapy at the initial stage and incomplete therapy at later stages. As a result, the applicant was exposed to continuous mental and physical suffering, diminishing his human dignity. The authorities' failure to provide him with the requisite medical care amounted to inhuman and degrading treatment within the meaning of Art. 3 of the ECHR.</p>
Stated violation (article)	<p>No violation of Art. 3 of the ECHR concerning the conditions of detention in the prison hospital.</p> <p>Violation of Art. 3 of the ECHR due to the lack of adequate medical assistance.</p> <p>Violation of Art. 13 of the ECHR.</p>

Name, number, link to the judgement	<p>Ivanov and Kashuba v. Ukraine (Applications nos. 12258/09 and 54754/10) http://hudoc.echr.coe.int/eng?i=001-189619</p>	
Date of rendering and effective date	<p>January 29, 2019</p>	
Facts	<p>The applicants in custody alleged that they had not been provided with adequate medical care due to their infectious diseases. The second applicant also alleged that he had contracted TB while in custody, but had not received adequate treatment; stated that in this connection he did not have effective legal protection in respect of his complaints of inadequate medical care. He also complained about inadequate conditions in the penal colony. So, during each exit from the cell he was handcuffed and accompanied by a convoy of service dogs.</p>	

<p>Legal position</p>	<p>The ECtHR notes at the outset that the life threatening nature of the applicants' conditions was beyond doubt.</p> <p>As regards application of Ivanov v. Ukraine, the ECtHR observes that the applicant had been shown to have HIV antibodies in 1996, following a series of blood tests that had been undertaken while he was detained in the Odessa SIZO. This fact is also corroborated by the notes made in his medical file. It appears in this connection that the authorities have not reacted to the applicant's condition in an adequate manner.</p> <p>What is more, after having been re-confirmed as HIV positive in June 2008 while detained in Zhytomyr prison, the applicant did not start receiving ART until March. Given the seriousness of the HIV infection, it was of utmost importance to commence the ART treatment without delay.</p> <p>The Government failed to present any convincing arguments justifying that delay. Moreover, they did not contest the applicant's argument, which is corroborated by the case-file materials, that he did not receive regular check-ups or HIV tests.</p> <p>As regards application Kashuba v. Ukraine, the ECtHR observes that upon arrival at the Lutsk SIZO in September 2000 and then at the Vinnytsya SIZO in September 2001, the second applicant was considered as a person who had previously suffered TB. However, the Government did not dispute that following a medical check up in March 2003, he had been diagnosed with TB. He had been examined dozens of times by the prison doctors and had apparently received certain treatment. Those circumstances, nevertheless, are not sufficient to convince the ECtHR that the treatment comprised a comprehensive therapeutic strategy and that the overall treatment and care provided to him were in compliance with the requirements of Article 3 of the ECHR.</p> <p>The ECtHR observes, in particular, that from June to August 2003 the second applicant did not receive any treatment for TB and that from February 2007 to April 2014 he was diagnosed on many occasions with residual changes to his TB in the upper part of his left lung. The Government further stressed that the applicant had had access to appropriate medical assistance. They, however, did not specify the nature of the treatment the second applicant had received during the above-mentioned period. Nor did they provide any documentary evidence, such as a copy of the applicant's medical file or a list of medical prescriptions.</p> <p>In the light of the foregoing, the Court finds that the medical care provided to the applicants was not adequate. As a result of the inadequacy of the medical care provided to them, they endured distress or hardship exceeding the unavoidable level of suffering inherent in detention, and their dignity was undermined.</p>
<p>Stated violation (article)</p>	<p>Violation of Art. 3 of the ECHR (concerning the lack of adequate medical treatment during the applicants' detention). Violation of Art. 3 of the ECHR (concerning the application of handcuffs to the second applicant). Violation of Art. 13 of the ECHR.</p> <p>Compensation: EUR 7,500 to the first applicant, EUR 9,800 to the second applicant, EUR 650 to the first applicant, in respect of costs and expenses.</p>

Name, number, link to the judgement	Petukhov v. Ukraine (No. 2) (Application No. 41216/13) http://hudoc.echr.coe.int/eng?i=001-191703	
Date of rendering and effective date	March 12, 2019 September 9, 2019	
Facts	<p>The applicant was sentenced to life imprisonment. He complained, <i>inter alia</i>, of inadequate medical care in prison.</p> <p>The applicant had suffered an irreversible health deterioration. During the period under consideration, he had suffered a recurrence of his pulmonary TB, and further medical treatment was found to be devoid of any prospect of success.</p>	
Legal position	<p>The ECtHR noted that the applicant was regularly examined by various doctors and subjected to various screening and laboratory tests. It cannot therefore be said that the respondent state left him unattended. However, the question remains as to whether the state's response to the applicant's disease proved to be effective. The domestic authorities acknowledged on several occasions that there was a shortage of anti-TB medication available in the prison. The authorities' inability to assure a regular, uninterrupted supply of essential anti-TB drugs to patients is a key factor in the failure of TB treatment.</p> <p>The ECtHR has noted evidence of poor medical assistance and protection against TB in Ukrainian detention facilities. Ukraine was one of the countries reporting the highest rate of TB treatment failure. Drug-resistant TB continues to spread in Ukraine, and the reasons for this include continued shortages of first-line drugs and lack of access to second-line full treatment schemes, especially in prison settings. In addition, there is no legal framework for ensuring palliative care in prisons, and no particular medical arrangements have been made for the applicant in this regard.</p>	
Stated violation (article)	Violation of Art. 3 of the ECHR. Compensation: EUR 20,770.	



NATIONAL LEGISLATION AND CASE LAW ON HIV/AIDS AND HUMAN RIGHTS

(issues of law enforcement in the field of HIV
and human rights)

I. Case law on HIV transmission

Knowingly exposing another person to the risk of HIV infection or HIV transmission to another person, including willful transmission, shall be punishable under Art. 130 of the CrC of Ukraine. Pursuant to part 1 of Art. 12 of the Law of Ukraine “On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV”, people living with HIV have a duty to: take measures to prevent the HIV transmission as proposed by health authorities; notify persons who were their partners of their HIV-positive status and of the possibility of infection; and refuse to donate blood, its components, other biological fluids, cells, organs and tissues for their use in medical practice.

Case No.1

Cases in this category may represent a combination of different types of criminal offences, including those involving malicious failure to take care of a child or a person under guardianship or custody.



Verdict of the Panel of Judges of the Court Chamber for Criminal Cases of the Court of Appeal of Mykolaiv Region (Case No. 11-596/11 of September 15, 2011).

Category: part 3 of Art. 130, Art. 166 of the CrC of Ukraine.

Open court. <https://reyestr.court.gov.ua/Review/21305697>

The Court found PERSON_3 guilty of failing to take measures to prevent her husband, PERSON_6, from contracting HIV, despite having known since 2008 that she was HIV-positive and that HIV is dangerous to the health and life of other people. PERSON_6 was diagnosed with HIV in 2009, and underwent treatment in the Mykolaiv Infectious Diseases Hospital. From January 29, 2010, PERSON_6 came under the care of the HIV Centre as a HIV-infected person, clinical stage 4, and died from this disease on March 20, 2010.

By her actions, which were regarded as improper performance by the mother of her responsibilities for the care of the child, PERSON_3 violated the requirements of current legislation, namely: Art. 21, 51, 52 of the Constitution of Ukraine, Art. 150-157 of the Family Code of Ukraine, as well as Art. 12 of the Law of Ukraine "On Child Protection".

In the appeal, the victim PERSON_5 asks to cancel the court's verdict on PERSON_3 and issue a new sentence, which condemn PERSON_3 under part 3 of Art. 130, Art. 166 of the CrC of Ukraine to imprisonment. The applicant refers to the incorrect release of the convict from serving a sentence under Art. 75 of the CrC of Ukraine. He believes that the convict's correction is possible only in conditions of isolation from society. Thus, the applicant indicates that the court unreasonably referred to the absence of aggravating circumstances, not taking into account that PERSON_3 committed a crime against a minor who was in a helpless state, her criminal actions led to the death of two people and notes that the court did not take into account that PERSON_3 committed a crime against close people: her newborn child and husband, and she is unemployed. In his opinion, these circumstances, as well as the immoral lifestyle of PERSON_3 pose a threat to the life and health of others. Therefore, the applicant believes that the probation period and the duties imposed by the court on the convict cannot ensure her proper conduct.

After hearing the judge's report, the explanations of the convict and her defence counsel, who objected to the appeal and asked to leave the sentence unchanged, the prosecutor, who upheld the victim's appeal, examining the case file and discussing the arguments of the appeal, the panel of judges considers that the appeal should be satisfied.

According to the factual circumstances of the crimes set forth in the sentence established by the court, the qualification of actions PERSON_3 under part 3 of Art. 130, 166 of the CrC of Ukraine, it is correct and not disputed by the appellant.

When appointing punishment for PERSON_3, court took into account the severity of the crimes, mitigating circumstances, the person's guilt, in compliance with the requirements of Art. 65 of the CrC of Ukraine, and correctly sentenced her to imprisonment within the sanctions of the articles of the criminal law under which she was convicted, and finally determined the punishment under Art. 70 of the CrC of Ukraine. However, the court of first instance incorrectly came to the conclusion about the possibility of correcting the convict from serving a probation sentence under Art. 75 of the CrC of Ukraine.

In accordance with part 2 of Art. 65 of the CrC of Ukraine, the person who committed the crime must be sentenced to the punishment necessary and sufficient to correct him/her and prevent new crimes.

Apparently, the convict committed two premeditated crimes: a serious and moderate crime against people close to her: a newborn child and a husband. In addition, a serious crime was committed against a minor who was in a helpless state. This crime had serious consequences: the death of two people. These circumstances in accordance with Art. 67 of the CrC of Ukraine are aggravating circumstances, and they must be taken into account when deciding on the social danger of the convict's behavior while at large.

The panel of judges believes that in such circumstances, despite the convict's remorse, there is a reason to believe that the probation period and the duties imposed on the convict cannot prevent the possibility of committing new crimes, and the correction is possible only in isolation from society.

Based on the above, the panel of judges considers it necessary to cancel the verdict of the court of first instance in connection with the incorrect release of PERSON_3 on probation from serving a sentence and to pass the sentence in this part on the basis of part 1 paragraph 4 Art. 378 of CrPC of Ukraine.

Guided by Art. 365, 366, 378 of the CrPC of Ukraine, the panel of judges of the Zavodskyi district court of Mykolayiv of February 16, 2011 regarding PERSON_3 in part of her release from serving the sentence imposed by this sentence with probation for 3 years on the basis of Art. 75 of the CrC of Ukraine, with the imposition on the convict of the duties provided for in paragraphs 2, 3, 4 part 1 of Art. 76 of the CrC of Ukraine, revoked and passed a new sentence, according to which PERSON_3 is considered convicted under part 3 of Art. 130, Art. 166, part 1 of Art. 70 of the CrC of Ukraine for 4 years of imprisonment.

The attention should be paid to the fact that the court of the first instance, Zavodskyi district court of Mykolayiv at consideration of case No. 1-228/11 appointed forensic medical examination for the purpose of establishment of causal connection (medical assessment) between illness of the convict and illness of her daughter and husband. According to the conclusions of the forensic medical examination No. 2723/2671-10, of December 7, 2010: "There is a direct causal link between the presence of HIV infection in PERSON_3 and the development of HIV infection in the daughter PERSON_2. There is no direct causal link between the presence of HIV infection in PERSON_3 and the development of HIV infection in PERSON_6. At performance of all appointments and recommendations of doctors (acceptance of ARV-therapy during pregnancy, childbirth, after childbirth, artificial feeding) it was possible to exclude infection of the child PERSON_2. Given the mother's refusal to conduct ARV therapy to the child, breastfeeding, during repeated conversations about the feasibility of artificial feeding, the child cannot avoid death. In the presence of HIV infection in PERSON_3 and in the refusal of specialized treatment, the onset of death is impossible to avoid... One of the ways of HIV transmission is the vertical path from infected mother to fetus, blood transfusions of HIV-infected blood, unprotected sexual intercourse. Having sex with an HIV-infected partner does not always result in HIV infection to the other partner, and for some time he or she may remain HIV-negative."

In author's opinion, it is appropriate to apply special legislation in the statement of reasons for the verdict, although this has not been done by any of the courts. The following special legislation besides the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV" could be used in the present situation:

- the Instruction on the Procedure for Preventing Mother-to-Child HIV Transmission approved by the Order of the MOH of Ukraine, the Ministry of Education and Science of Ukraine, the Ministry of Family, Youth and Sports of Ukraine, the State Department of Ukraine for the Execution of Sentences, the Ministry of Labor and Social Policy of Ukraine No. 740/1030/4154/321/614a of November 23, 2007
- the Unified Guidelines for primary, secondary (specialized) and tertiary (highly specialized) medical care "Prevention of mother to child HIV transmission", approved by Order of the MOH of Ukraine No. 449 of May 16, 2016.

It should be noted that in judicial practice there can be met cases of criminal prosecution for single *corpus delicti*, i.e. only under Art. 166 of the CrC of Ukraine, which are related to the deterioration of the condition due to HIV. The verdict of the Bilovodskyi District Court of Luhansk Region (Case No. 408/2361/19-k of August 9, 2019) approved the settlement agreement concluded between the accused PERSON_1 and the legal representative of the victim PERSON_4 in criminal proceedings No. 12018130430000224. PERSON_1 was found guilty of committing a criminal offence under Art. 166 of the CrC of Ukraine, and sentenced to imprisonment for a term of four years.

According to the conclusion of the forensic medical examination by the Luhansk Regional Bureau of Forensic Medical Examination No. 11/25 of March 19, 2019, commissioned in this case, between January 23, 2018 (the last time that the child PERSON_2 received treatment at the Communal Enterprise "Bilovodska Central District Hospital" and June 7, 2018 (when the child was removed from their mother), the state of the disease in PERSON_2 had deteriorated. Due to the deterioration in the child's health, an additional specialized examination was conducted at the Luhansk Regional Children's Clinical Hospital and Luhansk Regional TB Dispensary, and on June 23, 2018, the child was diagnosed with pulmonary TB. In connection with the development of TB, PERSON_2's HIV passed to the fourth, more severe clinical stage. Once the child PERSON_2 had been removed from their mother on June 7, 2018, it was diagnosed with the following: HIV (fourth clinical stage); cerebral palsy with spastic tetraparesis (level V); secondary mixed contractures of both upper and lower extremities with a sharp movement disorder; severe cerebral retardation; imbecility; TB of the upper lobe of the right lung (infiltrated), diagnosed for the first time on June 23, 2018; destruction + MTB 0. Inadequate conditions of child care, lack of systematic medical care and treatment, and inadequate full-fledged treatment served to worsen the child's health and the emergence of pulmonary TB.

Case No.2

This category of cases may involve a combination of different criminal offences, in particular related to sexual freedom and sexual integrity. It is important to note that HIV infection, which occurred as a result of the victim's rape or forcible sodomy, falls into the scope of part 5 of Art. 152 or part 5 of Art. 153 of the CrC of Ukraine on the grounds of causing serious consequences, and additional qualification under Art. 130 of the CC of Ukraine are not required.



Verdict of the Panel of Judges of the Judicial Chamber in Criminal Cases of Kharkiv Court of Appeal (Case No. 635/8410/115-к of February 27, 2020).

Category: part 3 of Art. 153, part 4 of Art. 152, part 1 of Art. 130 of the CrC of Ukraine.

Closed court. <https://reyestr.court.gov.ua/Review/88320457>

PERSON_1 was previously convicted under part 3 of Art.153 of the CrC of Ukraine to 14 years of imprisonment; part 4 of Art.152 of the CrC of Ukraine to 13 years 6 months of imprisonment; and part 1 of Art.130 of the CrC of Ukraine to 2 years of imprisonment. Pursuant to part 1 of Art. 70 of the CrC of Ukraine, the final sentence determined was 14 years of imprisonment, as with cumulative offences, less severe punishments are absorbed by more severe punishments.

According to the Verdict, on September 15, 2015 at about 03:30 a.m., PERSON_1 came to visit his friend PERSON_2 (born in 1989, who lives with children at: ADDRESS_2). PERSON_1, having climbed over the fence to the yard of the specified household, knocked on the window. PERSON_2 was not at home at that time, but minors PERSON_3, INFORMATION_2, together with her brother PERSON_4, INFORMATION_3 were in the house at the specified address. At the request of PERSON_1 to open the door, the girl obeyed as PERSON_1 was known to her, and unlocked the door from the inside, letting him into the house. At about 03:30 a.m. on September 15, 2015, PERSON_1, being in the household at the address: ADDRESS_2, realizing that PERSON_3 was a minor and due to her age would not be able to resist him physically (i.e. was in a helpless state), after forcible gratification of sexual desire in an unnatural way, raped PERSON_3 in a natural way. PERSON_1 decided to rape PERSON_3 in an unnatural way, as he realized that she was a minor and due to her age would not be able to resist him, i.e., was in a helpless state.

In addition, PERSON_1 had been registered since August 3, 2012, at the Communal Enterprise Regional Centre "Regional Centre for the Prevention and Control of AIDS" with a diagnosis of HIV (third clinical stage), as well as relapsing oropharyngeal candidiasis and chronic viral hepatitis C.

PERSON_1 knew that he had these diseases and had been warned when registering of the obligation to take measures to prevent the transmission of HIV, as it is dangerous to human life. PERSON_1 ignored this and deliberately put the minor PERSON_3 INFORMATION_2 at risk of infection with these sexually transmitted diseases by willfully not using a protective barrier method of contraception. PERSON_1 thereby committed all actions aimed at willful exposure of the victim to HIV infection.

It should be noted that in this case HIV is erroneously mentioned as a STI, although it is an infectious disease, because HIV is a socially dangerous infectious disease that develops due to infection with human immunodeficiency virus (HIV), long-term persistence of HIV in lymphocytes, macrophages and nerve tissue cells. The disease is characterized by progressive dysfunction of the immune, nervous, lymphatic and other body systems. According to modern notions, HIV is an incurable disease, has a long chronic course and, in the absence of effective therapy, ends in death.

Case No.3

This category of cases may involve a combination of different criminal offences, in particular, related to crimes against property.



Verdict of Shevchenkivskiy District Court of Chernivtsi

(Case No. 727/2573/15-к of June 30, 2015). Category: part 1 of Art. 125, part 1 of Art. 130, part 2 of Art. 186, part 2 of Article 15 of the CrC of Ukraine.

Open court. <https://reyestr.court.gov.ua/Review/49764820>

On March 4, 2015, at about 4:00 p.m., PERSON_2, being at the “Central” market at 9 Zahuly Street in Chernivtsi, openly stole cash in the amount of UAH 1,700 from the stand NUMBER_2, in which PERSON_9 carried out his business activities. The money was in a cardboard box on the counter. PERSON_2 was spotted by PERSON_10, who detained him after he had begun to flee.

On the same day at 4:00 p.m., in order to escape from the crime scene, PERSON_2, who knew for sure that he was HIV-positive, intentionally bit PERSON_11, who was holding his hands until the arrival of police officers.

At the hearing the accused PERSON_2 admitted his guilt in full, sincerely repented for what he had done, and explained that he had acted this way to improve his financial situation.

The court considered that the actions of the accused were qualified correctly under part 1 of Art. 130 of the CrC of Ukraine, because he had knowingly put another person at risk of contracting HIV, which is dangerous to human life.

When determining the type and measure of punishment, the court took into account the nature and severity of the criminal offences committed, all the circumstances of the case, the way the offences were committed, the reasons and conditions that prompted PERSON_2 to commit the crime and contributed to this, the scope of the charges against him, as well as his identity, the fact that he had previously been convicted, the fact that he was HIV-positive, the state of his health, the fact that he was mentally sound, and that he admitted his guilt completely and sincerely repented of the crime. The court also considered the damage caused to the victim, PERSON_11, and that PERSON_11 was compensated. The court found PERSON_2 guilty under part 1 of Art. 125, part 1 of Art. 130, part 2 of Art. 186, part 2 of Article 15, and part 2 of Art. 186 of the CrC of Ukraine. PERSON_2 was sentenced to four years and eight months of imprisonment.

It should be noted that according to item 3 of part 1 of Art. 65 of the CrC of Ukraine, when determining a sentence, the court must consider the identity of the accused, including, among the other criteria, his/her health condition. The ECtHR’s judgements in *Melnyk v. Ukraine* and *Mouisel v. France* provide an understanding of the ECtHR’s position on situations involving the detention of a sick person under inappropriate conditions. The ECtHR emphasizes that the components to be considered as to the compatibility of the applicant’s state of health and the conditions of his/her detention are as follows: the medical condition of the prisoner, the appropriateness of the imprisonment in view of the prisoner’s state of health, and the adequacy of the medical aid and care provided in the conditions of detention.

An example of a similar legal situation is the verdict of Bohunskiy District Court of Zhytomyr City (Case No. 295/6778/14-к of July 13, 2015).

Case No.4

When considering this category of cases, one shall bear in mind that crimes falling under part 1 of Art. 130 of the CrC of Ukraine belong to the category of formally defined crimes; that is, they are considered complete from the moment when actions that create a real danger of infecting another person with HIV have been committed. For the purposes of bringing a person to justice under part 1 of Art. 130 of the CrC of Ukraine, it does not matter whether the victim knew that the accused was carrying a disease, or whether he/she consented to the acts that exposed him/her to the risk of contracting HIV.



Verdict of Rubizhanskyi Town Court of Luhansk Region

(Case No. 425/1514/13-k of June 10, 2013) Category: part 1 of Art.130 of the CrC of Ukraine. Open court.

<https://reyestr.court.gov.ua/Review/32125804>

PERSON_2, INFORMATION_1, was accused of committing a crime under part 1 of Art. 130 of the CrC of Ukraine. PERSON_2 was born in the town of Rubizhne, Luhansk region, is a citizen of Ukraine and of Ukrainian nationality, has secondary education, unemployed, unmarried, and have not previously been convicted of any offence.

At the hearing, PERSON_2 admitted her guilt in committing a criminal act and sincerely repented. The court explained that from November 2012 to January 2013, PERSON_2 was being under the dispensary supervision of the outpatient department for patients with HIV or AIDS in Rubizhne. She had been diagnosed with HIV of the 3rd clinical stage on June 14, 2012. PERSON_2 was warned in the health care facility about her rights and responsibilities and about measures to prevent the transmission of the disease to other people. PERSON_2 lived together with PERSON_3, who was aware that she was carrying an incurable infectious disease that is dangerous to human life, but had sexual intercourse with the latter without taking precautions.

In addition to PERSON_2's full admission of guilt, there were other circumstances that were not disputed by any of the participants in the trial that her proved her guilt, so the court, being governed by Art. 349 of CrPC of Ukraine, did not find it expedient to study these. The court found that the accused and other participants in the trial correctly understood these circumstances and that there was no doubt as to the voluntariness and truth of their positions, and clarified that in this case the other participants in the trial would be deprived of the right to challenge these circumstances on appeal.

Having assessed all available evidence in aggregate, the court ruled that the actions of the accused PERSON_2 were correctly qualified under part 1 of Art. 130 of the CrC of Ukraine as willful exposure of another person to HIV.

The court found PERSON_2 guilty of committing a crime under part 1 of Art. 130 of the CC of Ukraine and sentenced her to imprisonment for a term of two years in accordance with this law. Pursuant to the Art. 75, 76 of the CrC of Ukraine, PERSON_2 was released on probation, with her probation period set at two years. PERSON_2 was obliged to periodically appear before the penitentiary authorities at her place of residence for registration.

In the author's opinion, in case concordant couple (married or unmarried) *corpus delicti* would not arise, because both persons have the same HIV status (positive or negative). However, in the case of a discordant couple, i.e. a couple in which one of the partners is HIV-positive and the other is HIV-negative, there are many issues, because even members of married couples may be at risk of criminal liability under part 1 of Art. 130 of the CrC of Ukraine.

Such couples face a number of problems: from maintaining relationships to the possibility of having healthy children. One of the regulative steps to solving the problems in the aspect of giving birth to healthy children in concordant couples with HIV-positive status and discordant couples is the MOH of Ukraine Order No. 933 of April 22, 2019. This Order amended Annex 1 to the Procedure for referring women for state budget-funded infertility treatment using assisted reproductive technologies according to absolute indications, approved by MOH of Ukraine Order No. 579 of November 29, 2004.

Case No.5



Verdict of the Central District Court of Mykolaiv City

(Case No. 490/11163/14-κ of October 15, 2015) Category: part 1 of Art.130 of the CrC of Ukraine. Open court.

<https://reyestr.court.gov.ua/Review/53086423>

PERSON_1 was accused of committing a crime under part 1 of Art. 130 of the CrC of Ukraine. PERSON_1, who had no previous convictions, was born INFORMATION_2 in Mykolayiv. PERSON_1 is a citizen of Ukraine of Ukrainian nationality, did not complete secondary education, was engaged in trade, was not married, and has a daughter, PERSON_3, INFORMATION_1.

On July 9, 2010, PERSON_1, after undergoing medical examinations related to her pregnancy, was sent to the Centre for HIV/AIDS Prevention and Control in the Mykolaiv region, located at 138-b, Potiomkinska Str., Mykolaiv. On July 19, 2010, PERSON_1 was informed that she was HIV-positive at the office of the Centre for HIV/AIDS Prevention and Control in Mykolaiv region, in accordance with the Law of Ukraine “On the Prevention of Acquired Immunodeficiency Syndrome (AIDS) and Social Protection of the Population”, of March 3, 1998.

On July 19, 2010, PERSON_1 was added to the dispensary register as a person carrying HIV, which can cause AIDS, a particularly dangerous disease that can lead to death due to the lack of specific prevention methods and effective treatment. After additional examination, PERSON_1 was diagnosed as being an asymptomatic carrier of HIV.

As an HIV-positive person, PERSON_1 was warned on the same day that she could be a source of HIV infection for others, i.e. treatment would not prevent the possibility of infecting other people by her, and she could put another person at risk of contracting HIV. The same day, PERSON_1 signed a warning that she understood these facts.

Despite this, PERSON_1, acting intentionally, realizing the dangerous nature of her actions, anticipating their socially dangerous consequences, ignoring her warning as a person infected with HIV, which she had signed on July 19, 2010, in the Centre for AIDS Prevention and Control of Mykolaiv region, regularly had sexual intercourse with her cohabiting partner, PERSON_4, in the period from January to August 2013 without taking precautionary measures and without notifying him that she was HIV-positive, and thus putting him at risk of contracting HIV.

Given the above, by her intentional, illegal actions PERSON_1 knowingly put the victim PERSON_4 at risk of contracting HIV.

During the trial, PERSON_1 pleaded not guilty to this offence.

PERSON_1 testified that while she was pregnant with her son, PERSON_5, in 2010 she had undergone examination and treatment at the Centre for HIV/AIDS Prevention and Control in Mykolaiv region, but that after she had given birth, her state of health was normal and she did not receive any treatment after 2010. She told PERSON_4 about this, and he agreed to have sexual relations with her under such circumstances. PERSON_1 also explained that she was in a relationship with PERSON_4, because she loved him and wanted to have a child with him, and in no way intended to endanger him or put him at risk of contracting HIV.

Pursuant to part 1 of Art. 130 of the CrC of Ukraine, which is mentioned in the indictment, liability arises from knowingly putting another person at risk of contracting an infectious disease.

Assessing the above circumstances in their entirety, the court disagreed that PERSON_1 engaging in sexual relations with PERSON_4 had put PERSON_4 in danger. The prosecutor's allegations that PERSON_1 had not told PERSON_4 about her health were also unproven.

Assessing the above circumstances in their entirety, the court did not find that PERSON_1 acted illegally in engaging in sexual relations with PERSON_4. The above evidence of elements of the objective side of the crime gave grounds to conclude that the pre-trial investigation authorities and the prosecutor did not prove that PERSON_1 was aware of the illegal nature of her actions and possible illegal consequences of such actions.

This indicates the lack of proof of the presence in the actions of PERSON_1 subjective side of the crime foreseen in part 1 of Art. 130 of the CrC of Ukraine. The case files do not contain evidence that PERSON_4 is currently infected with HIV. Therefore, there were no negative consequences of the actions referred to in the indictment. This excludes the possibility of bringing any person to justice for committing an unintentional crime.

The court, however, partially agreeing with the prosecutor, considered it necessary to note that the circumstances established by the court indicate that the relationship between PERSON_1 and PERSON_4 posed a threat of HIV infection.

Nevertheless, firstly, the *corpus delicti* does not include actions that create a threat of danger, but only actions that directly create danger. Secondly, the findings of the pre-trial investigation authorities and the prosecutor erroneously imposed responsibility for creating the threat of such danger on PERSON_1.

PERSON_1 testified that she was in a sexual relationship with PERSON_4 because she wanted to have a child with him, and her testimony was confirmed by the case files, which show that PERSON_1 did have a child from this relationship. Establishing a relationship in order to have a child does not contradict the norms of the current legislation, or the generally accepted requirements of morality. In view of the above, the actions of PERSON_1 in regard to this side of the relationship with PERSON_4 were neither illegal nor immoral.

At the same time PERSON_4, as evidenced by the case files, was 16 years older than PERSON_1, meaning that objectively, he had more experience, in particular of relationships with women. PERSON_4 had children with different women, had a family in Azerbaijan (the reason why he could not marry PERSON_1), was not taking care of his own children, and had different sexual partners. This suggests that he held more guilt than PERSON_1 for creating a situation where there was the threat of HIV infection.

Assessing the above circumstances in their entirety, the court concluded that the pre-trial investigation authorities and the prosecutor did not prove that the actions of PERSON_1 constituted a criminal offence under part 1 of Art. 130 of the CrC of Ukraine, due to which she should be found not guilty and acquitted.

It should be noted that the objective side of the crime under part 1 of Art. 130 of the CrC of Ukraine is characterized by: a) illegal action (inaction); b) its consequences in the form of creating a danger for another person to contract an infectious disease; and c) the cause-and-effect relation between the illegal act and the consequences. The subjective side of this crime is characterized by intent, i.e. the fact that the person: a) realizes that he/she acts illegally; b) provides that his/her actions are dangerous for other persons, because they may have consequences in the form of infection of another person with an incurable disease; and c) desires or knowingly allows the occurrence of such consequences.

It is important that at the time when the criminal offence under this article is committed, the person:

- 1) had a diagnosis. According to item 2.2 of the Procedure for diagnosing HIV infection, approved by MOH of Ukraine Order No. 585, of July 10, 2013, an HIV diagnosis is established by an infectious disease doctor affiliated to the AIDS Centre (CHD) or CHC located at the patient's place of residence, where the office "Trust" operates. The doctor who carries out the diagnosis must have undergone specialized postgraduate training on HIV-infection and AIDS in a higher medical educational institution.
- 2) was informed about his/her HIV-positive status, in accordance with the requirements of part 2 of Article 7 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV".
- 3) provided written confirmation that he/she had received information about his/her HIV-positive status. Item 2.4 of this Procedure states that when receiving a diagnosis of HIV, the patient is obliged to provide written confirmation in any form under his/her own signature that he/she has received information on the preventive measures necessary to maintain his/her health as an HIV-positive person and to prevent further transmission of HIV. The patient must also be informed of the safeguards of the rights and freedoms of people living with HIV respect, as well as criminal liability for knowingly putting another person at risk of contracting HIV, in accordance with part 4 of Art. 7 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV".



Verdict of the Court of Appeal of Mykolaiv Region

(Case No. 490/11163/14-к of December 28, 2016)

<https://reyestr.court.gov.ua/Review/63763966>

The Court of Appeal considered that the acquittal of the court of first instance should be revoked, due to the incompleteness of the trial and the inconsistency of the conclusions of the court of first instance with the actual circumstances of the criminal proceedings.

The testimony of the accused, PERSON_2, given by her in the court of first instance and during the appellate review of the proceedings, shows that while being pregnant with her son, PERSON_9, in 2010, she underwent examination and treatment at the Centre for HIV/AIDS Prevention and Control in Mykolaiv region. PERSON_2 knew that she was infected with HIV, but after giving birth she was in good health, so since 2010 she neither visited the Centre, nor received any treatment. She told her cohabitant partner, PERSON_5 about these circumstances. She explained that she had been in a relationship with PERSON_5, because she loved him and wanted a child with him, and in no way intended to endanger him or put him at risk of contracting HIV.

In the Court of Appeal, PERSON_2 indicated that she understood that her behavior had put PERSON_5 in danger, nevertheless he agreed to have sex with her in such circumstances. She noted that PERSON_5 slandered her, stating that he learned about her HIV status from the investigator while in Mykolaiv SIZO when he had been testifying in other criminal proceedings, because since August 2013 the relationship between PERSON_2 and PERSON_5 had become hostile.

According to the indictment, PERSON_2 was accused of regularly having sexual intercourse with her cohabitant partner, PERSON_5, in the period between January and August 2013 without taking precautionary measures and without notifying him that she was HIV-positive, and thus putting him at risk of contracting HIV. The indictment accused PERSON_2 of acting intentionally, despite understanding the dangerous nature of her actions and their consequences and ignoring the warning that she had signed on July 19, 2010 at the Centre for HIV/AIDS Prevention and Control in Mykolaiv region. Given the above, she had committed a crime under part 1 of Art. 130 of the CrC of Ukraine.

In acquitting PERSON_2, the court of first instance referred to the lack of evidence that would indicate that PERSON_2: a) knew about her HIV diagnosis; and b) knowingly and unlawfully put PERSON_5 at risk of contracting HIV. The court concluded that until August 2013, no warning about her HIV could have been drawn up and served to PERSON_2. However, analysis of the materials of the criminal proceedings gives grounds to claim the opposite. In addition, the court did not provide a proper assessment of the testimony of the witness PERSON_6, and details included in the outpatient medical records of PERSON_2.

According to a report from the Centre for HIV/AIDS Prevention and Control in Mykolaiv region of March 11, 2016 (case sheet 150), the outpatient medical records for PERSON_2 (withdrawn by the court) did not contain the warning given to a person who is diagnosed as HIV-positive (form No. 503-3/o), because PERSON_2 was tested for HIV in another facility, namely Maternity Welfare Centre No. 1 in Mykolayiv. The results of the test confirmed that PERSON_2 was HIV-positive, and post-test counselling was conducted. Pursuant to sub-paragraphs 4.3.2.4 of p. 4.3.2 item 4.3 of the relevant by-laws, during post-test counselling, the doctor offers to fill in form No. 503-3/o. One copy of the form goes to the patient, and the second copy remains in the medical institution that undertook the HIV test and informed the patient of the positive result. Given the above, PERSON_2 was not issued with a second warning when she was placed on the dispensary register in Centre for HIV/AIDS Prevention and Control in Mykolaiv region. These facts were confirmed at the appeal hearing by a doctor from Maternity Welfare Centre No. 1 in Mykolayiv, PERSON_6, who noted that PERSON_2 tested positive for HIV in their facility in 2010, and was warned of the risks as a person carrying HIV, but she was further transferred to a women's clinic.

In addition, PERSON_2 was warned about criminal liability for knowingly putting another person at risk of contracting HIV (Art. 130 of the CrC of Ukraine). She personally signed the warning and refused to take a copy away with her, which is recorded in the warning.

The Court of Appeal reliably established that PERSON_2 received the warning that she was HIV positive on August 10, 2010, as evidenced by her personal signature on the warning.

On July 19, 2010, PERSON_1 was added to the dispensary register as a person carrying HIV, which can cause AIDS, a particularly dangerous disease that can lead to death due to the lack of specific prevention methods and effective treatment. After further medical examination PERSON_2 was diagnosed as an asymptomatic carrier of HIV. On August 10, 2010, PERSON_2 was warned that as a carrier of HIV, i.e. about the fact that treatment would not prevent the possibility of infecting other people, and she could put another person at risk of contracting HIV. PERSON_2 signed this warning.

Despite this, PERSON_2, regularly had sexual intercourse with her cohabitant partner, PERSON_5, in the period between January 2013 and August 2013 without taking precautionary measures and without notifying him that she was HIV-positive, and thus putting him at risk of contracting HIV. PERSON_5 acted intentionally, understood the dangerous nature of her actions and their consequences, and ignored the warning that she had signed on August 10, 2010, in the Women's Welfare Centre No. 1 in Mykolaiv.

To qualify an action as falling under part 1 of Art. 130 of the CrC of Ukraine, it is only necessary to establish that the person knew (was aware) that he/she was HIV-positive before sexual intercourse, but knowingly put another person at risk of contracting the virus. The consent of a partner to such a relationship and the fact that he/she has not contracted HIV is irrelevant to the qualification of the act under part 1 of Art. 130 of the CrC of Ukraine.

Taking into account all of the evidence detailed above, the Court of Appeal found PERSON_2 guilty of committing the specified criminal offence, and qualified her actions under part 1 of Art. 130 of the CrC of Ukraine as deliberate exposure of PERSON_5 to HIV. The Court of Appeal ruled to reverse the verdict of the Central District Court of Mykolayiv of October 15, 2015 regarding PERSON_2, by which she was found not guilty and acquitted under part 1 of Art. 130 of the CrC of Ukraine on the basis of the absence of any actions *corpus delicti*.

The appellate court passed a new verdict: PERSON_2 was found guilty under part 1 of Art. 130 of the CrC of Ukraine and sentenced to imprisonment for a term of one year.

The Verdict of the Court of Appeal of Mykolaiv region of December 28, 2016 regarding PERSON_2 was upheld by the Panel of Judges of the Judicial Chamber in Criminal Cases of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases Ruling of June 22, 2017.

A crime falling under part 1 of Art. 130 of the CC of Ukraine is considered complete from the moment that an action is committed that creates the danger of infection. The crime presupposes awareness, i.e. knowledge on the part of the person committing the action of their HIV status or the presence of another incurable infectious disease that is life-threatening, as well as awareness that the action puts the victim at risk of infection. To qualify the act under part 1 of Art. 130 of the CrC of Ukraine, it is only necessary to establish that the person knew (was aware) of his/her HIV status before sexual intercourse, but knowingly put another person at risk of contracting the virus. The consent of a person to the relationship and the fact that he/she has not contracted HIV is irrelevant to the qualification of the act under part 1 of Art. 130 of the CrC of Ukraine.

This case raises the question of the possibility of decriminalization in Ukrainian legislation in the field of HIV/AIDS of certain actions related to HIV infection. The line between acts that create a threat of danger and actions that directly create danger, as an element of the objective side of the crime, indicated by the court of first instance, is thin, and the actions are of evaluative nature.

Deliberately putting another person at risk of infection despite the presence of knowledge (awareness) of a person of positive HIV status, is determining in such cases. The subjective side of the crime under part 1 of Art. 130 of the CrC of Ukraine, is characterized by indirect intent or criminal arrogance. The subjective side of other *corpus delicti* under Art. 130 of the CrC of Ukraine differs. From the subjective side, the crime under part 2 of Art. 130 of the CrC of Ukraine, is characterized by negligence in the form of criminal arrogance, and the subjective side of the crime under part 4 of Art. 130 of the CrC of Ukraine, is characterized by direct or indirect intent. Some countries are moving away from criminalization as a precaution against HIV infection, taking into account scientific advances in this area, in particular the positive impact of antiretroviral therapy on people living with HIV (for example, Denmark) or taking into account certain statutory circumstances, such as consent of a partner for an intimate relationship with a person living with HIV (for example, Germany). In Ukraine, criminal law is being reformed, a new code is being developed, so the legislator is to choose a model of state action in the field of HIV/AIDS to maintain the human rights balance.

An example of a similar legal situation is the Verdict of Ternivskiyi Town Court of Dnipropetrovsk region (Case No. 440/2098/12, of November 28, 2012).

Case No.6



Verdict of Haisynskyi District Court of Vinnytsia region

(Case No. 1-192-2007r, of July 4, 2007). Category: part 1 of Art.130 of the CrC of Ukraine. Open court.

<https://reyestr.court.gov.ua/Review/2409486>

PERSON_1 had been registered as HIV-positive with the office of infectious diseases of Haisin Central District Hospital since February 19, 2001. On January 29, 2007, PERSON_1 donated blood in the transfusion department of Haisin Central District Hospital, without notifying medical staff about his HIV status, which deliberately put others at risk of HIV infection. At the hearing, PERSON_1 pleaded guilty to the crime in full, but asked the court not to punish him severely. PERSON_1 explained that he was dependent on his pregnant cohabiting partner, who, as well as himself, was HIV-positive, that he was unemployed and got by on temporary earnings, and that their family was in a difficult financial situation.

In addition to the full admission of guilt by the defendant himself, his guilt was proved by the testimony of witnesses questioned at the hearing, and in particular by the questionnaire completed by PERSON_1 of January 29, 2007 (when he went to donate blood), in which he indicated that he was not HIV-positive or suffering from AIDS (case sheet No 38), and by the warning to a person carrying HIV of February 19, 2001 (case sheet No 39). The actions of PERSON_1 were qualified under part 1 of Art. 130 of the CrC of Ukraine as willful exposure of another person to HIV.

The court found PERSON_1 guilty of committing a crime under part 1 of Art. 130 of the CrC of Ukraine, imposing a sentence in the form of imprisonment for a term of two years. Based on Art. 75 of the CrC of Ukraine, PERSON_1 was released to serve his sentence on probation for a period of one year.

It should be noted that according to part 1 of Art. 12 of the Law of Ukraine “On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV”, duties of people living with HIV include, without limitation: refusal to donate blood and its components, other biological fluids, cells, organs and tissues for their use in medical practice.

II. Case law on compensation for damages

Case No.1



Judgement of Shevchenkivskyi District Court in Kyiv city

(Case No. 761/24076/15-u, of December 21, 2017). Open court.

<https://reyestr.court.gov.ua/Review/71401786>

In August 2015 PERSON_1 (hereinafter, the plaintiff), acting in the interests of her minor son PERSON_6, filed a claim with Shevchenkivskyi District Court in Kyiv city against Kyiv City Blood Centre, part of the Health Department of the Executive Body of Kyiv City Council (Kyiv City State Administration) (hereinafter, defendant-1) and

Kyiv City State Administration (hereinafter. defendant-2), and a third party, the Main Department of the State Treasury Service of Ukraine in the city of Kyiv (hereinafter, the third party-1). The claim was for non-pecuniary damages and pecuniary damages resulting from the fact that the child had contracted HIV. The child did not contract HIV from his parents, as they were tested for HIV on January 26, 2012, and January 27, 2012, and the results were negative.

The plaintiff believed that the Kyiv City Blood Centre failed to comply with the statutory procedure to test the donor, PERSON_8, for HIV. PERSON_8's donated blood was examined improperly using testing systems produced in Ukraine, and this resulted in the blood infected with a deadly disease entering the body of the plaintiff's son, PERSON_6, during transfusion.

The plaintiff stated that as a result of the negligent actions of defendant-1, the child was infected with an incurable disease. This resulted in caused severe emotional distress for both the mother and the child, whose life is endangered and who now has to take medication all the time on a strict schedule.

Acting in the interests of her minor son PERSON_6, PERSON_1 asked the court to jointly recover non-pecuniary damages of UAH 3,000,000.00 and pecuniary damages of UAH 5,000.00 in her favour from the defendants, Kyiv City Blood Centre – part of the Department of Health of the Executive Body of Kyiv City Council (Kyiv City State Administration) – and Kyiv City State Administration.

On December 11, 2015, PERSON_2, the representative of the plaintiff, filed a revised statement of claim with the court, in which he involved the MOH of Ukraine as a co-defendant in the case. The revised claim asked the court to recover non-pecuniary damages in the amount of UAH 3,000,000.00 and pecuniary damages in the amount of UAH 5,000.00 in PERSON_1's favor (acting in the interests of her minor son PERSON_6) jointly and severally from the Kyiv City Blood Centre – part of the Department of Health of the Executive Body of Kyiv City Council (Kyiv City State Administration) – Kyiv City State Administration, and the MOH of Ukraine.

Having heard the explanations of the participants in the trial, questioned the witness, examined the case files, and assessed the evidence collected in the case, the court established the following circumstances and the corresponding legal relationship.

The court found that according to INFORMATION_1 the plaintiff and her husband PERSON_10 had a son PERSON_6, a fact confirmed by a copy of the birth certificate, which is contained in the case files (case sheet No 4). PERSON_6 was born as a result of artificial insemination, and was cared for under the Intracytoplasmic Sperm Injection (ICSI) programme as he was born prematurely (case sheet No 5).

The child's (PERSON_6) condition was regarded by doctors as severe, and for this reason on July 26, 2011, he was transferred to the neonatal intensive care unit at the National Children's Specialized Hospital (NCSH) "Okhmatdyt" for further treatment, where he stayed until August 4, 2011, as confirmed by excerpts from his newborn development card and Health History No. 128, copies of which were also contained in the case files (case sheets No 7, 8-10, 11).

Subsequently, on August 4, 2011, due to the closure of the neonatal intensive care unit at NCSH "Okhmatdyt", PERSON_6 was transferred to the Department of Anesthesiology and Neonatal Intensive Care at Kyiv City Children's Clinical Hospital No. 2 to continue treatment. On August 17, 2011, PERSON_6, received a transfusion of washed erythrocytes from a container of blood (No. 26.52.2002264), procured by the Kyiv City Blood Centre on August 15, 2011, from the donor PERSON_8. This blood transfusion took place without PERSON_6's parents giving their informed consent.

On September 6, 2011, PERSON_6 was transferred to the intensive care department for premature infants at NCSH "Okhmatdyt" for further care and treatment, where he stayed from September 6, 2011, until October 18, 2011. PERSON_6 was then discharged in satisfactory condition under the supervision of a district pediatrician, and pediatric neurologist, ophthalmologist and cardiac surgeon.

On January 25, 2012, PERSON_6 was diagnosed with HIV, as a result of which on January 31, 2012, he was admitted for treatment at the Centre for the treatment children affected by HIV and AIDS at NCSH "Okhmatdyt", where he stayed until February 2, 2012 and where he was finally diagnosed with HIV (B 23.8), 4th clinical stage. On February 20, 2012, PERSON_6 was declared disabled.

A commission to investigate cases of HIV infection of children in the course of receiving medical care was established to comply with the MOH of Ukraine Order No. 712, of September 11, 2012. This commission (held on September 13-14, 2012) drew up a Certificate of Verification of the circumstances of HIV infection of a child through blood components in the city of Kyiv, which established that the most probable source of HIV infection of the child were the washed erythrocytes obtained from the blood of donor PERSON_8, procured by the Kyiv City Blood Centre on August 16, 2011. The blood was probably procured during the period of "seroconversion window". The certificate suggested the introduction of mandatory testing of donor blood using the method of polymerase chain reaction to test for the presence of nucleic acids of pathogens of infectious diseases transmitted by hemotransfusion (case sheet No. 84-88) at the blood service of Ukraine.

According to the test results as of August 16, 2011, performed on the blood of PERSON_8, vial No. 26.52.2002264, HIV antibodies were listed as negative (case sheet No. 75).

According to state registration certificate No. 8844/2009, enzyme-linked immunosorbent assays for diagnosing HIV, manufactured by LLC "Diagnostic Systems – Ukraine" were included into the State Register of Medical Equipment and Medical Devices of Ukraine and allowed for use in medical practice. The certificate was valid until August 11, 2014 (case sheet No. 77).

The court concluded that the plaintiff's child, PERSON_6, contracted an incurable disease (HIV) because blood from donor PERSON_8 was not effectively tested for antibodies to HIV by Kyiv City Blood Centre, and washed erythrocytes from this blood then got into the blood of the child.

This became possible because Kyiv City Blood Centre failed to implement testing of donor blood by polymerase chain reaction to determine the presence of nucleic acids of infectious agents transmitted by hemotransfusion during the testing of donor PERSON_8's blood. As a result of this, HIV-infected blood was received by the Kyiv City Blood Centre, and then the plaintiff's son PERSON_6 was infected with a deadly disease.

In accordance with para. 1 of the MOH of Ukraine Order, which was approved by the Decree of the President of Ukraine No. 467/2011, of April 13, 2011 (as amended at the time of the dispute), the MOH of Ukraine is the central executive authority, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine. The MOH of Ukraine is the main authority in the system of central executive authorities in the formulation and implementation of state policy in the fields of: health; sanitary and epidemiological well-being; creation, production, quality control and sale of medicines, medical immunobiologic drugs and medical devices; and combatting HIV/AIDS and other socially dangerous diseases.

Thus, the state, represented by the MOH of Ukraine, had failed in its positive obligation to protect the life and health of PERSON_6 from possible infection with a deadly disease in a healthcare facility. Such a situation is unacceptable.

In these circumstances, there are grounds for holding defendant-1 and defendant-3 liable for causing non-pecuniary damage to the plaintiff as a result of her child's HIV infection.

The court ruled to partially grant the claim of PERSON_1 acting in the interests of her minor son PERSON_6, against the Kyiv City Blood Centre – part of the Department of Health of the Executive Authority of Kyiv City Council (Kyiv City State Administration) – the MOH of Ukraine, and Kyiv City State Administration, as well as against the following third parties: Main Department of the State Treasury Service of Ukraine in Kyiv, Kyiv City Children's Clinical Hospital No. 2, State Service of Ukraine for Medicines and Drug Control, State Treasury Service of Ukraine, and PERSON_8 for non-pecuniary damages and pecuniary damages caused by HIV infection.

The court ruled that UAH 1,000,000.00 as non-pecuniary damages should be awarded to PERSON_1, acting in the interests of her minor son PERSON_6, i.e. UAH 500,000.00 each from the Kyiv City Blood Centre – part of the Department of Health of the Executive Authority of the Kyiv City Council (Kyiv City State Administration) – and the MOH of Ukraine. The court also ruled that PERSON_1 should be awarded UAH 5,000.00 for the cost of a psychological testing, i.e. UAH 2,500.00 from each of the Kyiv City Blood Centre – part of the Department of Health of the Executive Authority of the Kyiv City Council (Kyiv City State Administration) – and the MOH of Ukraine.



Judgement of the Court of Appeal of Kyiv city consisting of the Panel of Judges of the Judicial Chamber in Civil Cases

(Case No. 761/24076/15-u, of March 15, 2018). Open court.

<https://reyestr.court.gov.ua/Review/72819776>

After having heard the court judge’s V.M. Ratnikova report and the accounts of the participants in the case, as well as having checked the materials of the case and discussed the arguments of the appeals, the panel of judges came to the conclusion that the appeals should not be granted. The following grounds were given for this judgement.

The court of first instance established the fact that the plaintiff’s son, PERSON_7, contracted HIV as a result of a transfusion of washed erythrocytes, i.e. due to the fault of the defendants – the Kyiv City Blood Centre and the MOH of Ukraine – as a donor blood collection institution and the central authority implementing state policy in the field of health care respectively. On this basis, there were legal grounds for recovering non-pecuniary and pecuniary damages suffered by the child’s mother, PERSON_5, from the defendants, due to her son contracting an incurable disease in a healthcare facility. The court granted her claims in part, ordering the recovery of non-pecuniary damages in favour of PERSON_5 of UAH 500,000.00 from each of the defendants, and pecuniary damages in the amount of UAH 2,500.00 from each of the defendants.

The panel of judges agreed with the conclusion of the court of first instance, and considered that this conclusion fully meets the requirements of the law and the evidence available in the case, and the arguments of the appeals do not refute its correctness.

As established during the proceedings, the Kyiv City Blood Centre did not take the necessary steps to identify the recipient who received the transfusion of erythrocytes obtained from the blood of PERSON_6, and did not notify his legal representatives of the need to examine the child for possible infectious disease as a result of medical procedures.

The fact that the child, PERSON_7, had contracted HIV, was discovered by chance, during treatment and examination at another healthcare facility, the National Children’s Specialized Hospital “Okhmatdyt”, in January 2012. Consequently, from October 6, 2011, when a positive test indicated the presence of antibodies for HIV in the blood of the donor, PERSON_6, to January 21, 2012, when the presence of HIV in PERSON_7 was detected by chance, the child did not receive any treatment.

The recommendations in the World Health Organization’s “Consolidated Guidelines on the Use of Antiretroviral Drugs for the Treatment and Prevention of HIV” emphasize the importance of timely diagnosis of HIV and appropriate treatment, which significantly increases the life expectancy of the infected persons and reduces the risk of infecting others.

Due to the fact that the Kyiv City Blood Centre did not provide information about the positive detection of HIV antibodies in the blood of the donor, PERSON_6, to the medical institution treating the child, which received the blood and was the child’s legal representative, minor PERSON_7 was not examined and was not treated immediately after infection.

Given the young age of the child, his poor health due to a premature birth, and the special nature of the disease with which he was infected, the consequences of the Kyiv City Blood Centre's inaction, in any case, were regarded as causing harm to the health of a minor child.

Given the specific incurable nature of the disease that was transmitted to PERSON_7, the inability to clearly predict the course of the disease and the consequences of not prescribing treatment immediately, the plaintiff's reference to the fact that the actions of the Kyiv City Blood Centre caused her moral harm were justified. This moral harm refers to the feelings that the plaintiff suffered as a result of her child's infection and due to the indifference and lack of understanding on the part of the staff at the state health care facility.

The findings in this case indicate that at the end of the period intended for the implementation of the Programme for the Development of Donation of Blood and its Components for 2002-2007, which was entrusted to the MOH of Ukraine, no reliable procedure for testing donor blood for HIV had been developed, and the MOH of Ukraine had failed to equip the laboratories of blood service facilities with laboratory equipment needed for using different types of testing systems.

The Programme for the Development of Donation of Blood and its Components for 2002-2007 placed emphasis on the problem of infection safety in relation to donated blood components and drugs made from these. Despite this, the MOH of Ukraine did not take the minimum measures provided for by the Programme to ensure testing of donated blood using multiple testing systems.

To sum up, it can be concluded that the procedures developed and implemented by the MOH of Ukraine to control the safety and quality of donor blood, its components and drugs made from these are not state-of-the-art, do not ensure the effective prevention of transmission of infectious diseases through blood, and do not create sufficient conditions for the most effective and timely detection of infections in donated blood.

As a result of such an imperfect regulatory framework, donor blood that is HIV-infected and thus can infect recipients with a deadly incurable disease can be put into circulation and transferred to healthcare facilities for further use. As the central executive authority tasked with formulating and implementing state health care policy, the MOH of Ukraine is the one to blame for the fact that a minor, PERSON_7, contracted HIV. There is a direct cause-and-effect relation between this event and the failure of the defendant to perform its functions and powers in the field of health care.

In this case, the basis for imposing responsibility for non-pecuniary damages caused to the plaintiff on the MOH of Ukraine and the Kyiv City Blood Centre is the establishment of a cause-and-effect relation between the implementation of their functions as authorities and facilities operating in the medical field, and the established fact of infection with an incurable infectious disease.

The Court of Appeal ruled to dismiss the appeal filed by the representative of the defendant – the MOH of Ukraine, and to dismiss the appeal of the defendant – Kyiv City Blood Centre, part of the Health Department of the Executive Authority of Kyiv City Council (Kyiv City State Administration).



Judgement of the Supreme Court consisting of the Panel of Judges of the Second Judicial Chamber of the Civil Court of Cassation

(Case No. 761/24076/15-u, of November 15, 2018)

<https://reyestr.court.gov.ua/Review/77910974>

Cassation appeals by the MOH of Ukraine and Kyiv City Blood Centre, part of the Health Department of the Executive Authority of Kyiv City Council (Kyiv City State Administration) were dismissed. The judgement of the Shevchenkivskiy District Court of Kyiv City of December 21, 2017, and the judgement of the Court of Appeal of Kyiv City of March 15, 2018, were upheld.

The attention should be paid to some remarks: 1) one of the judgements applied the European Charter of Patients' Rights, a document developed by a group of international non-governmental organizations.

This Charter is a document that can be equated with "soft law" documents and has a quasi-recommendatory character. Therefore, such acts should not be used in judgements; 2) the right to health care is a safeguard of the right to life; the realization of the right to life is not possible without the realization of the right to health care, because the normal biological and social functioning of a human is not possible without health. The realization of the right to life in full is only possible with the granting of the right to health care. The right to life is protected in Art. 2 of the ECHR, according to which everyone's right to life is protected by law. At the same time, according to the established practice of the ECtHR, this right is considered to be violated not only in the case of deprivation of life, but also in case of a serious damage to the human body, which did not cause death, but posed a serious threat to life. Thus, failure to provide proper medical care that has resulted in the death of a person or endangered his/her life (for example, HIV infection) falls under the protection of Art. 2 of the ECHR.

Case No.2



Judgement of Kyivskiy District Court of Odesa City

(Case No. 520/10475/17, of September 3, 2018). Open court.

<https://reyestr.court.gov.ua/Review/76195256>

On September 5, 2017, the plaintiff, PERSON_4, filed a claim with the Kyivskiy District Court of Odesa City against the defendant, PERSON_3, for non-pecuniary damages. The plaintiff asked the court to recover in her favor pecuniary damages of UAH 100,000.00 from the defendant. In support of the claims, the plaintiff referred to the fact that she, PERSON_4, lives in a communal apartment at ADDRESS_1 together with a minor, PERSON_6. The plaintiff also noted that since September 14, 2015, PERSON_7 had also lived in this apartment. PERSON_4 claimed that PERSON_7 had previous convictions, was addicted to drugs, lived an "immoral lifestyle", and suffered from a number of infectious diseases, namely: TB, HIV, and hepatitis. The plaintiff noted that PERSON_7's grandmother, PERSON_3, was aware of her granddaughter's health status and was present when PERSON_7 acquired the room at ADDRESS_1, but did not visit her during the time that PERSON_7 lived in the room in the communal apartment at ADDRESS_1.

At the time of the claim PERSON_4 was registered in the database held by TB dispensaries as a person who had been in contact with a carrier of TB, and was under medical supervision.

In this regard, as stated by the plaintiff, because the defendant was aware that PERSON_7 had these diseases but did not take action to notify her neighbors, she should be held responsible for knowingly exposing PERSON_4 and her minor child PERSON_6, to HIV, TB and hepatitis.

The court considered the plaintiff's reference to substantiate the claims unfounded, as the plaintiff had not provided the court with any evidence to prove that: a) PERSON_7 really suffered from a number of infectious diseases, namely: TB, HIV, and hepatitis; b) PERSON_7, having these diseases, really lived in a room in the communal apartment at ADDRESS_1, next to PERSON_4; c) PERSON_7 had died INFORMATION_2; d) the diseases and medical examinations of PERSON_4 were associated with having had contact with PERSON_7; e) PERSON_3 is a relative of PERSON_7; e) PERSON_3 was aware that PERSON_7 was suffering from these diseases.

The court noted that the copies of medical documents relating to examination of the plaintiff's health and the health of her young daughter provided by the plaintiff, were not proper and convincing evidence to confirm that PERSON_4 had an infectious disease, and that the medical examinations that she underwent, were related to having had contact with and having lived next to PERSON_7.

The plaintiff claimed that the defendant, PERSON_3, was aware of PERSON_7's health status but did not notify her neighbors and that this endangered life, including the life of the plaintiff. Because of this, she should be liable for non-pecuniary damages.

The court considered these claims to be unfounded in full, because the plaintiff, as already noted, presented no evidence to the court that PERSON_7 really suffered from a number of infectious diseases, or evidence that the defendant, PERSON_3, was a relative of PERSON_7 and was aware of the latter's health status.

In addition, at the hearing, the plaintiff personally confirmed that she had no written evidence to confirm that PERSON_7 was ill with a number of infectious diseases or that PERSON_3 was aware of PERSON_7's health status. The plaintiff also had no evidence to confirm the cause-and-effect relation that the diseases suffered by the plaintiff and her young daughter were contracted as a result of contact with PERSON_7.

Therefore, on the basis of the evidence presented to the court, the court considered the plaintiff's reference to substantiate the claims as unfounded, finding no evidence or causation for the infliction by the defendant of non-pecuniary damage to the plaintiff.

The court decided to dismiss the claim of PERSON_2 (place of residence: ADDRESS_1, 65070) against PERSON_3 (place of residence: ADDRESS_3, 65080) for non-pecuniary damages.

The attention should be paid to several important aspects:

- 1) according to part 3 of Art. 13 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV", information on the results of an HIV test and on the presence or absence of HIV infection in a person is a confidential information and a medical secret. Healthcare professionals are obliged to take the necessary measures to ensure the proper storage of confidential information about people living with HIV and to ensure that such information is not made publicly available or disclosed to third parties;
- 2) transfer by a medical worker of information that is confidential to other third parties should only occur following a court decision in the cases established by law. Therefore, in order to obtain evidence of HIV-positive status, the plaintiff must file a petition with the court, in satisfaction of which only the court will be entitled to direct the order to obtain data that constitute a medical secret;
- 3) to confirm the cause-and-effect relation (medical assessment) between the diseases of a person with HIV-positive status and the threat faced by another person of becoming ill or contracting a disease, it is necessary to conduct a forensic examination.

III. Case law on confidential information disclosure

Case No.1



Verdict of Kirovskyi District Court of Kirovohrad City

(Case No. 404/652/18, of July 24, 2019) Category: part 1, Art. 368, Art. 132 of the CrC of Ukraine. Closed court.

<https://reyestr.court.gov.ua/Review/83242144>

Publication of information about this case is prohibited according to paragraph 4 of part 1 of Art. 7 of the Law of Ukraine “On Access to Court Judgements”, in terms of the circumstances under Art. 132 of the CrC of Ukraine.

The Court ruled to declare PERSON_1 innocent of the charges acquit her under part 1 of Art. 368 of the CrC of Ukraine, due to the lack of evidence on committing the crime and according to INFORMATION_3 of Ukraine, due to the lack of *corpus delicti* in her actions.



Ruling of Kropyvnytskyi Court of Appeal consisting of the Panel of Judges of the Judicial Chamber of the Criminal Cases

(Case No. 11-кп/4809/550/19, of November 21, 2019). Open court.

<https://reyestr.court.gov.ua/Review/85924854>

According to the indictment, PERSON_1 was charged with obtaining an illegal benefit by an official for committing an action in the interests of a third party using the official position, as well as with disclosing information about a medical examination of a person to detect the presence of HIV or another infectious disease that is life-threatening, or for AIDS and the results of this examination, which became known to her in the course of performance of official duties.

During an inspection of her office (located in the premises of Communal Enterprise “Kirovohrad Central District Hospital” located at: 5 Aeroflotska Street, Kropyvnytskyi City) on December 15, 2017, at 11:20 a.m., PERSON_1 reported that PERSON_2 had AIDS, in the presence of investigator V.P. Balatskyi and witnesses PERSON_4 and PERSON_5. As a result of this disclosure, PERSON_2’s HIV status became known to persons who were not legally entitled to know this information, contrary to the rules established in the legislation, which caused violating medical secrecy and the rules governing PERSON_1’s exercise of her professional duties.

PERSON_1 was accused of disclosing information about a medical examination of a person to detect the presence of HIV or AIDS and the results of this examination, which became known to her in the course of performance of her official duties. In regard to this accusation, the court of first instance noted the following.

During an inspection of her office (located in the premises of Communal Enterprise “Kirovohrad Central District Hospital” located at: 5 Aeroflotska Street, Kropyvnytskyi City) on December 15, 2017, at 11:20 a.m., PERSON_1 reported that PERSON_2 had AIDS, in the presence of the investigator PERSON_30 and witnesses PERSON_4 and PERSON_5. As a result of this disclosure, PERSON_2’s HIV status became known to persons who were not legally entitled to obtain this information.

Information about the results of a medical examination and on HIV status of the person who has undergone the medical examination is confidential and constitutes a medical secret. Disclosure of such information is only allowed to the person to whom it relates, or to certain other parties in cases provided by law: to the legal representatives of the person concerned, to health care facilities, or to prosecutors, investigators and courts according to the court order.

Disclosure of information means that a person who is obliged to keep the relevant information in secret illegally discloses it to third parties, or by his/her behavior creates conditions that allow third parties to obtain the relevant information.

The Judgement of the Constitutional Court of Ukraine of October 30, 1997 in the case concerning the official interpretation of the Law of Ukraine "On Information" states that medical information – i.e. evidence relating to human health, medical history, the purpose of proposed research and treatment, and prognosis for a disease, including the presence of a risk to life and health – constitutes confidential information, i.e., the information with restricted access.

According to the provisions of Art. 1, 11 and 21 of the Law of Ukraine "On Information", information about an individual (personal data) means confidential information or collection of information about the individual, who is identified or can be identified.

The video of the scene of December 15, 2017, shows that an investigator from the Investigative Directorate of the Main Department of the National Police in Kirovohrad region and employees of the Economy Protection Directorate unit in Kirovohrad region and of the Economy Protection Department of the National Police of Ukraine came to the office of the head of Obstetrics and Gynecology Department S.V.V. for the purpose of conducting an inspection.

After the invitation of witnesses to the office of PERSON_1, the latter addressed the police and asked: "Why didn't they come before the surgery when I was 'bathing in AIDS' there? When the investigator asked why PERSON_1 "bathed in AIDS", the latter answered that they should go and ask "her". The investigator asked: "Who has AIDS?" and noted that PERSON_1, as a doctor, had no right to disclose medical secrets about the HIV status of another person. PERSON_1 replied that she did not disclose any information.

The examined evidence suggested that the accused "in the presence of investigator B.V.P. and witnesses PERSON_4 and PERSON_5" did not report that PERSON_2 had HIV or AIDS, and the above allegations of the accused regarding "bathing in AIDS", were not related at the time, in that particular case, to PERSON_2. In the opinion of the court, these were emotional statements about the complexity and special nature of the work of the accused herself, who was outraged by the intrusion into her office.

In view of the above, and adhering to the limits of the accusation, the court concluded that PERSON_1 should be acquitted under part 1 of Art. 368 of the CrC of Ukraine due to the lack of evidence of her committing this crime, and according to Art.132 of the CrC of Ukraine, due to the absence of any evidence that a crime took place.

The court of first instance duly reasoned in its verdict that the circumstances indicated no objective aspect in the actions of PERSON_1, as provided for by Art. 132 of the CrC of Ukraine.

The request of the prosecutor to allow him time to prepare the new conviction with the exclusion of conviction under Art. 132 of the CrC of Ukraine were unfounded. This was also confirmed by the operative part of the appeal, in which the prosecutor asked the court to impose a punishment on PERSON_1 under both part 1 of Art. 368, and Art.132 of the CrC of Ukraine.

The Court of Appeal decided to dismiss the appeal of the Prosecutor's Office of Kirovohrad region, and to uphold the verdict of Kirovskyi District Court of Kirovohrad City of July 24, 2019, in respect of PERSON_1.



***Ruling of the Supreme Court consisting of the Panel of Judges
of the Third Judicial Chamber of the Criminal Court of Cassation***

(Case No. 404/652/18, of April 13, 2020)

<https://reyestr.court.gov.ua/Review/88739681>

The Supreme Court ruled to return the Cassation Appeal of the First Deputy Prosecutor of Kirovohrad Region from the Verdict of Kirovskyi District Court of Kirovohrad City of July 24, 2019, and Ruling of Kropyvnytskyi Court of Appeal of November 21, 2019, in criminal proceedings No. 1201712000000214 in respect of PERSON_1, to the person who filed it.

It should be noted that:

- 1) the objective aspect of the crime under Art. 132 of the CrC of Ukraine consists in disclosure of information on: a) medical examination of a person to detect infection with HIV or another incurable infectious disease that is life-threatening or acquired AIDS; b) its results;
- 2) the legislative coordinating system and the regulatory safeguard of the protection of information about a person's HIV-positive status from disclosure to third parties is regulated by Art. 13 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV";
- 3) one of the principles of voluntary counselling (VCT) on HIV is confidentiality, i.e. information that becomes known to the counsellor or the person who conducted testing during the provision of VCT services (the fact of the person's applying, the content of the services received, data on the patient's personal life, contact details, test results, etc.), is confidential.

Pre- and post-test counselling, as well as notification of the test result should be carried out confidentially. Given that information about the result of an HIV test, and the presence or absence of HIV in a person who has undergone a medical examination, is confidential and constitutes medical secrecy, notification is only allowed to the person concerned, and in cases provided by Ukrainian laws, also to the legal representatives of this person, health care facilities, prosecutor's offices, investigation agencies, inquiry agencies and courts (Procedure for voluntary counselling and testing for HIV infection (protocol), approved by the MOH of Ukraine Order No. 415, of August 19, 2005).

Case No.2



Judgement of the Central District Court of Simferopol

(Case No. 122/9610/2012, of January 22, 2013).

Category: Art. 132 of the CrC of Ukraine. Closed court.

<https://reyestr.court.gov.ua/Review/33251278>

Publication of information about this case is prohibited according to paragraph 4 of part 1 of Art. 7 of the Law of Ukraine "On Access to Court Judgements".

At a teacher-parent meeting, the class teacher told the children's parents about a new student. The mother of one of the boy's classmates worked as a nurse in an orphanage where the child had previously been living. From this nurse, parents learned about the HIV status of the applicant's son.

Case No.3



Judgement of Prymorskyi District Court of Odesa City

(Case No. 2/1522/2897/11, of November 3, 2011) Open court.

<https://reyestr.court.gov.ua/Review/19544850>

The plaintiff filed a claim within the court, referring to the fact that from April 28, 2000, to February 20, 2006 she served under contract in the military unit 2524 of the State Border Guard Service of Ukraine as a junior inspector with the rank of a sergeant. In 2002, she was first diagnosed with chronic hepatitis C. From November 15, 2005, to December 4, 2005, she was undergoing an annual medical assessment to ensure that she was fit to work in the hospital. When she was discharged from the hospital, she was not informed that she had tested positive for HIV, and was only given an epicrisis with a diagnosis of hepatitis C. However, the doctor informed her partner about her HIV status. The plaintiff later learned that she was HIV-positive and that a letter had been sent from the hospital to her place of service stating that she was unfit to work. The plaintiff stated that these circumstances had caused her irreparable non-pecuniary damage as a result of the illegal disclosure of a medical secret by hospital officials, as this information became known at her place of service and residence, which ruined her life. Further employment became impossible, which worsened her financial situation, and the relationship with her partner broke down. In addition, unaware of her illness, she was a threat to others for some time, which also caused her moral harm.

Representatives of the defendant by virtue of powers of attorney did not admit the claim and asked the court to dismiss the claim in full, indicating that information about the results of PERSON_2's medical examination was not disclosed. Rather, this information was brought to the notice of the plaintiff and her parents, and with her consent, was provided to the Central Military Medical Commission of the State Border Guard Service of Ukraine.

The court found that the plaintiff was sent to the hospital for a medical assessment of her fitness to work, where she voluntarily agreed to undergo HIV testing, the results of which were reported to her.

On October 29, 2008, investigators from the Odesa Garrison Military Prosecutor's Office issued a decision refusing to initiate a criminal case, the text of which shows that initiation of criminal proceedings against officials from the Clinical Hospital of the State Border Guard Service of Ukraine in Odesa was denied because of lack of *corpus delicti*. Thus, the officials met all the requirements of the law, namely: they provided an affordable, high-quality, voluntary medical examination to detect HIV; and the plaintiff was informed about the results of the examination and provided counselling assistance and recommendations from someone qualified to give these, who warned her about the need to take preventive measures and the safeguards of protecting the rights and freedoms of HIV-positive people, as well as criminal liability for infecting other persons. An anonymous medical examination would only be conducted at the request of the individual; when giving her consent to testing, the plaintiff did not insist on anonymity.

The court ruled to dismiss the claim of PERSON_2 for compensation for non-pecuniary damage against the Hospital of the Southern Regional Department of the State Border Guard Service of Ukraine and the third party, the Main Department of the State Treasury of Ukraine.

It should be noted that: 1) parents and legal representatives have the right to be present during HIV testing of children under 14 years of age, be notified of its results, and are obliged to ensure the confidentiality of data on the HIV status of persons whose interests they represent (Art. 6 of the Law Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV"; 2) in accordance with part 5 of Art. 13 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV", disclosure by a medical worker of information about the positive HIV status of a person to a partner(s) is only allowed if: a) a person living with HIV applies to a medical worker with the relevant written request; b) the person living with HIV dies, loses consciousness or is likely to lose consciousness and not regain his or her ability to give informed consent

Case No.4



Judgement of Samara District Court of Dnipropetrovsk City

(Case No. 205/9115/19, of October 27, 2020) Open court.

<https://reyestr.court.gov.ua/Review/92828293>

PERSON_1 appealed to the court with a claim to PERSON_2, Communal non-profit enterprise "Dnipro Center for Primary Health Care № 10" Dnipro City Council for illegal actions of a medical worker and recovery of non-pecuniary damage in the amount of UAH 200,000. Non-pecuniary damage is related to the restriction of rights due to the disclosure/revealing of information about HIV-positive status.

In support of this claim the applicant stated that on April 17, 2018, doctor-neurologist of the said health care facility, PERSON_2, issued PERSON_3 and PERSON_4 a referral in the name of PERSON_1 to a psychiatrist, where the diagnosis of "consequences of recovered Leukoencephalitis (progressive multifocal against the background of acquired immunodeficiency B20 ...)" was stated. Thus, the doctor disclosed the diagnosis of the plaintiff to her husband PERSON_3, PERSON_4 (stepfather of PERSON_3) and psychiatrist. The plaintiff did not give informed consent for such disclosure. Because of the issuance of this referral, the plaintiff was deprived of the opportunity to communicate freely with her children for more than a year, as her husband was motivated by the fact that she and her diagnosis pose a threat to children and others.

Witness PERSON_3 explained before the court that the plaintiff PERSON_1 was his ex-wife. During the marriage in 2006 he knew nothing about the disease of PERSON_1. He became aware of the HIV-positive status of PERSON_1 in the summer of 2016. At that time, the tongue of PERSON_1 had been paralyzed, and she was sent for examination to the infectious diseases department, where she was diagnosed with HIV. After he learned of his wife's diagnosis, he did not leave her. PERSON_1 explained that she was hiding her HIV-positive status. PERSON_1 was in inpatient treatment until 2017, and after discharge treatment continued at home. In the summer of 2017 she had an epileptic seizure, an ambulance was called, PERSON_1 began to behave violently, ambulance doctors injected her with tranquilizers. He also explained that PERSON_1 was registered with the defendant doctor-neurologist PERSON_2. He, as the plaintiff's husband, personally engaged in her treatment, received a referral for an encephalogram in PERSON_2. As of 2017, PERSON_2 was already aware of the plaintiff's diagnosis. After the epileptic seizure, PERSON_1 became aggressive, did not look after herself. In April 2018, PERSON_2 handed him the PERSON_1's referral for a consultation indicating the diagnosis of "B-20". After receiving a referral from PERSON_2, he went to the doctor PERSON_8, who served their area. He personally went with his stepfather (PERSON_4) to this doctor and explained the whole situation. PERSON_1 was not at the reception then. The next time she agreed to come, and came to see a psychiatrist with her sister. PERSON_1 agreed that he should provide and receive from doctors all medical documentation concerning her. He also explained that their joint children with the plaintiff live with him by the decision of the executive committee. PERSON_1 comes 3-4 times a year, arranges scandals and calls the police, because she is not given children due to aggressive behaviour due to mental disorders.

As noted in court in response to the statement of claim by PERSON_2 the representative of the defendant, the plaintiff PERSON_1, during a personal visit to a neurologist PERSON_2, in the presence of her husband PERSON_3, informed the doctor of her HIV-positive status by herself. These events took place long before the defendant issued a referral to a psychiatrist. This circumstance was also confirmed in the testimony of the witness PERSON_3.

In addition, as shown by the witness PERSON_3, he consulted a neurologist PERSON_2 in connection with the deterioration of the mental state of the plaintiff PERSON_1 and provided the doctor with the results of MRI (magnetic resonance therapy), with the diagnosis of "progressive leukopathy caused by B-20".

According to the results of PERSON_1's MRI and provided information PERSON_3 about the behaviour and deterioration of the mental state of the patient, PERSON_2 concluded that the disease is progressive and can lead to severe mental disorder, in connection with which came to the conclusion of the need to involve another medical professional, namely the psychiatrist.

At the same time, PERSON_2 wrote a referral to PERSON_1 for examination by a psychiatrist, seeing the real threat to the patient's health and the need to involve a medical specialist in psychiatry to establish further tactics of management and treatment of PERSON_1, rewriting the diagnosis from the specified conclusion goal: tactics of managing the patient by a neurologist.

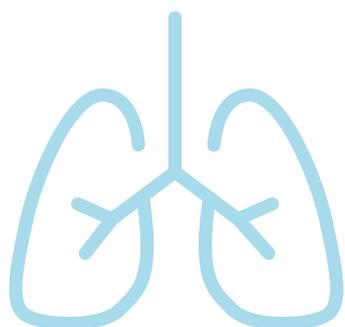
Based on the above circumstances, the court did not see in the actions of the defendant PERSON_2 the fact of disclosure of the plaintiff's diagnosis, because the husband was well aware of the PERSON_1's HIV-positive status, and specified in the direction of the diagnosis PERSON_2 information is professionally necessary for a psychiatrist (another specialist), who is involved in providing medical care to PERSON_1.

In addition, the witness PERSON_3 at the hearing stressed that he really limited the plaintiff's ability to communicate with their children, because he saw the danger to them in connection with the deterioration of the mental state of PERSON_1 and her aggressive behavior, and not in connection with HIV-positive status of the latter.

Thus, the court did not see a causal link between the actions of the defendant PERSON_2 and the task of non-pecuniary damage, which was expressed in the restriction of the plaintiff's right to communicate with her children.

The court refused in satisfaction of the claim of PERSON_1 to PERSON_2, Communal non-profit enterprise "Dnipro Center of primary health care No. 10" Dnipro city council on the recognition of illegal actions of a medical worker and recovery of non-pecuniary damage.

It should be noted that: 1) in accordance with part 4 of Art. 13 of the Law of Ukraine "On combating the spread of diseases caused by human immunodeficiency virus (HIV), and legal and social protection of people living with HIV", the transfer of medical information specified in part 3 of this article (information on the results of testing a person to identify HIV, on the presence or absence of HIV infection), is allowed only, in particular, to other health professionals and health care institutions: only in connection with the treatment of this person. The transfer of the information referred to in part 3 of this article to other healthcare professionals and health care institutions is allowed only with the informed consent of the person living with HIV to the transfer of such information provided in writing and only for the purposes of related to the treatment of HIV-related diseases and if the physician's awareness of the patient's HIV status is essential for his/her treatment. In view of the analyzed legal regulation, human rights violations were committed, as the plaintiff emphasized that she did not give informed consent. Therefore, the court in this case did not check the existence of such consent in writing, did not establish human rights violations in this segment.



NATIONAL LEGISLATION AND CASE LAW ON TUBERCULOSIS AND HUMAN RIGHTS

(issues of law enforcement in the field
of TB and human rights)

I. Case law on tuberculosis and malicious failure to take care of a child

Pursuant to part 3 of Art. of the Law of Ukraine “On Combatting Tuberculosis”, patients with TB and those who are infected with Mycobacteria TB are obliged to: 1) adhere to the treatment regimen prescribed to them in accordance with the standard of medical care; 2) follow the rules of internal regulations of the health care facility during inpatient or sanatorium treatment; 3) undergo mandatory medical examinations and tests for TB within the established time limits, determined by the relevant industry standards in the field of health care; and 4) comply with the requirements of the anti-epidemic regime. Patients with infectious forms of TB shall be hospitalized in facilities for the treatment of TB. If a patient with an infectious form of TB refuses hospitalization, they can be treated on an outpatient basis and self-isolate at home (Art. 10 of the relevant Law).

Case No.1



Verdict of Mizhhirskiy District Court of Zakarpattia region

(Case No. 302/1080/17, of January 29, 2018).

Category: Art. 166 of the CrC of Ukraine

<https://reyestr.court.gov.ua/Review/71913490>

Part 2 of Art. 150 of the Family Code of Ukraine requires parents to take care of their child's health and physical development. PERSON_2, the father of the minor PERSON_5, INFORMATION_4, maliciously evaded these responsibilities as follows. PERSON_2, knew and understood that since September 2012, he had been registered in the “D” register of the TB department of Mizhhirya District Hospital with a diagnosis of multidrug-resistant TB, destruction + Mycobacteria TB detected by microscopic smear as falling into category 4.1.A (multidrug-resistant TB, confirmed by a general treatment drug susceptibility test), and that he was at risk of passing on these infectious diseases to others. Despite this, for two years (2012-2014), PERSON_2 refused inpatient treatment, and maintained contact with his young daughter PERSON_5, INFORMATION_4, residing at: 52, Rozy Laptevoi Str., Verkhniy Bystryi village,

Mizhhirskiyi district, Zakarpattia region during the entire period. This led to serious consequences, namely that minor PERSON_5 was placed on the “D” register of the TB department of Mizhhirya District Hospital on May 29, 2014, with a diagnosis of FD EPTB (first diagnosed extrapulmonary TB) of the right-hand internal lymph nodes. The reason for the child contracting this illness was direct contact with her father, PERSON_2.

The accused, PERSON_2, pleaded guilty in court to the crime under Art. 166 of the CrC of Ukraine, sincerely repented and showed that he knew that he was ill, but wanted to be with his family, and therefore constantly communicated with the child.

The court considered it possible to apply Art. 69 of the CrC of Ukraine in this case and to deliver a sentence below the lowest limit of the sanction provided by Art. 166 of the CrC of Ukraine, given the presence of mitigating circumstances, namely: PERSON_2's sincere repentance, active assistance in solving the crime, and his admittance of guilt, as well as the fact that he is a disabled person (group II disability), who continues suffer from multidrug-resistant TB.

The court declared PERSON_2 guilty of the charges brought under Art.166 of the CrC of Ukraine with the application of Art. 69 of the CrC of Ukraine and sentenced him to imprisonment for a term of one year.

Examples of similar legal situations can be met in the verdict of Volochyskyi District Court of Khmelnytskyi Region (Case No. 671/745/16-к, of July 4, 2016), the verdict of Zhovtovodskyi Town Court of Dnipropetrovsk region (Case No. 0414/896/2012, of May 4, 2012), and the verdict of Ternivskyi Town Court of Dnipropetrovsk region (Case No. 194/115/18, of March 6, 2018).

Case No.2



Verdict of Krasnokutskyi District Court of Kharkiv region

(Case No. 627/1358/15-к, of December 9, 2015).

Category: Art. 166 of the CrC of Ukraine

<https://reyestr.court.gov.ua/Review/54304040>

PERSON_1, the mother of minors PERSON_2, INFORMATION_6, and PERSON_3, INFORMATION_7, from March 19, 2014, to January 13, 2015, failed to look after her children properly, evident in the fact that the children were untidy, starving, left unattended, lacked clothing, personal hygiene products.

This situation occurred despite the fact that she was being warned repeatedly of her childcare duties by Kachalivska Village Council, as an agency of guardianship and custodianship, and the Department of Juvenile Services of Krasnokutskyi District State Administration.

A forensic medical examination (No. 364al/15) found that PERSON_2 was suffering from general hypothermia and first degree frostbite in the fingers of both hands, which occurred as a result of exposure to low temperatures in connection with the failure of PERSON_1 to perform her duties to care for her own child PERSON_2 and to provide proper living conditions for the minor child. According to the conclusions of an additional forensic medical examination (No. 21-KK/15), the frostbite observed in PERSON_2 was severe enough to qualify as a minor bodily injury. In addition, PERSON_2 repeatedly had colds, and burns on the torso and lower extremities. PERSON_1 did not pay attention to meeting the educational and welfare needs of PERSON_2, failing to provide appropriate conditions for the psychological and social development of the child. The child's unsatisfactory living conditions negatively affected his health, leading to serious consequences: TB, repeated colds, intestinal infections, allergic dermatitis, nausea, and miliaria.

At the hearing, the accused PERSON_1 pleaded guilty to committing a criminal offence under Art. 166 of the CrC of Ukraine, and did not deny the facts detailed above, explaining that she really did not take care of her children and abused alcohol. Pursuant to Art. 75 of the CrC of Ukraine PERSON_1 was released on probation, with the probation period set at two years.

An example of a similar legal situation is the verdict of Pervomaiskyi District Court of the Autonomous Republic of Crimea (Case No. 1/0115/18/2012 of February 17, 2012).

Attention should be paid to the following: 1) malicious non-fulfilment of the duty to take care of a child or of a person in respect of whom guardianship or custody has been established, constitutes a crime under Art. 166 of the CrC of Ukraine only in the event that this lack of care results in serious consequences. Serious consequences are an evaluative concept, but it might be possible to use the scope of the concept “serious consequences”, which is used in crimes against life and health. According to analysis of this practice, all malicious evasion of responsibilities by parents leads to serious consequences for the health of children. Item 6.4 “*Corpus delicti* of crimes against the life of a person in medicine” of the Analysis by the Supreme Specialized Court for Civil and Criminal Cases “On the judicial practice of criminal proceedings with respect to crimes against life and health of a person for 2014” of June 3, 2016, states that consequences in the context of crimes against life and health of a person are “the death of the victim; bodily injury; transmission of an infection, serious or other illness that significantly affects the normal course of life of the victim and requires long-term treatment; serious injuries, mental disorders or disease; and significant deterioration of the person’s health. To determine the meaning of the term “serious illness” the List of Chronic Diseases, approved by the Ministry of Health of the USSR Order No. 52, of February 8, 1985 should be applied. Also, the concept “serious illness” covers diseases that cause a person’s disability. The above List includes TB of the lungs and other organs; 2) the obligatory element of the objective aspect of the *corpus delicti* of this criminal offence is the cause-and-effect relation between the serious consequences for children (or the person under guardianship or custody) and the actions of parents (guardians or custodians). Therefore, the author believes that in this category of cases, a forensic examination should be ordered to establish the immediacy of the cause-and-effect relation (medical assessment) between the parents’ malicious failure to perform their duties and the serious consequences for the children.

Case No.3



Verdict of Pavlohradskyi District Court of Dnipropetrovsk region
(Case No. 194/441/16-к, of July 25, 2016). Category: part 3 of Art. 186
and Art. 166 of the CrC of Ukraine.

<https://reyestr.court.gov.ua/Review/61485491>

During the period from April 2015 to January 17, 2016, PERSON_1, the mother of a minor PERSON_4, INFORMATION_3, intentionally and maliciously failed to fulfil her statutory parental duties to take care of her child. This was evidenced in the fact that she lived with her son at ADDRESS_2 together with PERSON_8, who had disseminated lung ITB (TB), PERSON_1 was fully aware of the said fact, as she had been duly warned about it, and that she failed to ensure that her son PERSON_4 received proper medical care. On 12 June 2015 PERSON_1 was warned by Z.V.V., the tuberculothapist at Communal Enterprise “Ternivska Central Town Hospital of the Dnipropetrovska Regional Council” that the result of the Mantoux test administered to her son PERSON_4 on June 8, 2015, was positive, and that he needed an additional examination and consultation at the TB Department of Communal Enterprise “DOKLPO”. The same doctor followed up with PERSON_1, calling her on the telephone on June 22, 2015, August 21, 2015, September 15, 2015, October 26, 2015, and December 22, 2015, and speaking with her when PERSON_1 visited the doctor on December 9, 2015.

PERSON_1 did not respond to these calls, and showed an irresponsible attitude towards the possible consequences for her son PERSON_4 in case she decided to continue to cohabit with PERSON_8, who suffered from disseminated lung ITB (TB).

PERSON_1's intentional evasion of her duty to take care of her child's health and failure to provide proper care for his physical condition resulted in serious consequences for her minor son PERSON_4, INFORMATION_2. According to the minutes of a meeting of the Central Medical Consultation Board on TB No. 193, of February 2, 2016, PERSON_4 was diagnosed with TB of the internal thoracic lymph nodes.

PERSON_4, INFORMATION_2 suffered from various health disorders caused by the absence of adequate living conditions, nutrition, proper care and constant medical supervision; and these threatened his life and significantly harmed his health. These severe health consequences were causally related to the intentional and malicious failure of PERSON_1 to fulfil her parental responsibilities.

During the court hearing, the accused PERSON_1 fully admitted her guilt in committing criminal offences under part 3 of Art. 186 and Art. 166 of the CrC of Ukraine.

Despite being informed by doctors about the danger to her child, ignoring doctors' reports that the Mantoux test administered to her son came back positive, and ignoring doctors' requests for additional examinations and treatment, PERSON_1 was reckless about the possible serious consequences of her actions. This resulted in her son developing ITB of the internal thoracic lymph nodes(TB). PERSON_1 is currently treating her son at her own expense, taking proper care of him and has eliminated the conditions that caused her son to develop TB.

The court declared PERSON_1 guilty of the charges brought against her under part 3 of Art. 186 and Art. 166 of the CrC of Ukraine.

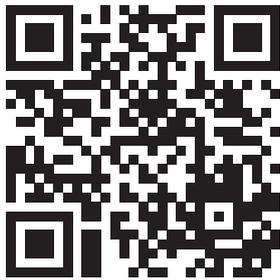
II. Case law on involuntary hospitalization of patients with infectious forms of TB

According to Art. 1 of the Law of Ukraine No. 2586-III "On Combatting Tuberculosis" of July 5, 2001 (hereinafter, Law No. 2586), hospitalization means admission of a person with TB or a person suspected of having TB to the inpatient department of an anti-TB facility for the purpose of diagnosis, treatment or isolation. Art. 10 of Law No. 2586 deals with the mandatory conditions for anti-TB treatment, which are: a) provision by the patient or his/her legal representative or guardian of informed consent to treatment; b) a written warning to the patient about the need to comply, and conditions of such compliance, with the anti-epidemic regime. Pursuant to part 1 of Art. 11 of Law No. 2586, if a patient with an infectious form of TB violate the anti-epidemic regime, including during outpatient or inpatient treatment, thus creating the risk of transmitting TB to others, he/she may be forcibly hospitalized by court order to anti-TB facilities that have appropriate departments (wards) to accommodate such patients in order to prevent the spread of TB.

Therefore, in order to carry out involuntary hospitalization, clear legal requirements must be met. The only condition for the involuntary hospitalization is a violation of the anti-epidemic regime that creates the risk of transmitting TB to others. An anti-epidemic regime means special anti-epidemic measures (rules of conduct of a person suffering from a contagious form of TB) established by the MOH of Ukraine aimed at protecting the population (including medical and other workers) from contracting the causative agent of TB. A patient with TB has a duty to adhere to an anti-epidemic regime, in accordance with paragraph 4 of part 3 of Art. 20 of Law No. 2586.

Legislators have repeatedly used the term “anti-epidemic regime” in various acts, but the MOH of Ukraine has not established any unified anti-epidemic measures; therefore, each TB facility should develop local rules of conduct for a person suffering from a contagious form of TB, accommodate him/her in an appropriate facility, and make the patient aware of this before he/she signs the relevant consent. In addition, the attending physician and other medical workers should properly record violations of the anti-epidemic regime in accordance with their professional responsibilities (e.g., during the shift), in particular by making appropriate entries in the patient’s primary records and writing reports to the administration of the facility. These reports may serve as evidence if a need for compulsory hospitalization arises. In addition, pursuant to parts 2, 4 of Art. 293 of the CPC of Ukraine, cases of involuntary hospitalization in a TB institution shall be considered by a court consisting of one judge and two jurors.

Case No.1



Judgement of Irpin City Court of Kyiv region

(Case No. 367/9034/18, of December 21, 2018). Open court.

<https://reyestr.court.gov.ua/Review/78764454>

Kyiv City TB Hospital No.2 filed an application with the Irpin City Court of Kyiv region for compulsory hospitalization of PERSON_4 in the anti-TB facility. The applicant noted that in accordance with conclusion No. 1267 of the Medical Consultative Board of Kyiv City TB Hospital No.2 of August 30, 2018, PERSON_4 was diagnosed with: RRTB (June 14, 2018) of the upper lobes of both lungs (infiltrative) Destr +, MBT +, M +, MGO, RIFO, K +, Res (HRSE), Res II (Et Km Lfx), hist0, CAT 4 (others), KOG2 (2018). PERSON_4 required compulsory hospitalization in a anti-TB facility until the cessation of bacterial excretion, starting from the date of the actual hospitalization.

The patient needed to undergo a course of anti-TB treatment, adhere to the treatment regimen, follow the prescription of a doctor from the anti-TB facility, undergo the necessary medical examinations within the prescribed time limits, and comply with the requirements of sanitary-hygienic and sanitary-anti-epidemic rules and regulations in treatment and prevention facilities.

Compulsory treatment was recommended because the patient was refusing treatment and would not consent to hospitalization, posing a threat to himself and others. Based on the above, the applicant requested the compulsory hospitalization of PERSON_4, INFORMATION_1, who was registered at: ADDRESS_1, but actually residing at: ADDRESS_1, in an anti-TB facility – Kyiv City TB Hospital No. 2 (Hostomel, Kyiv region, 08290) – for a period of three months.

Having heard the participants in the process and examined the case file, the court agreed that the application for compulsory treatment in accordance with para. 12 of part 1 of Art. 1 of the Law of Ukraine “On Combatting TB” should be granted, given that at the time the patient was refusing treatment and would not consent to hospitalization, posing a threat to himself and others. In view of the above circumstances, the court believed that the application by Kyiv City TB Hospital No. 2 was justified and should be granted, as PERSON_4 had been discharged from the inpatient department of KCTH No. 2 for violating the anti-epidemic regime. The court ruled to grant the application and to order the compulsory hospitalization of PERSON_4, INFORMATION_1, who was registered at: ADDRESS_1, but was actually residing at: ADDRESS_1, in an anti-TB institution – Kyiv City TB Hospital No. 2 (Hostomel, Kyiv region, 08290) – for a period of three months, starting from the day of the actual hospitalization. A copy of the court judgement was ordered to be sent for information and execution to Kyiv City TB Hospital No. 2, the Territorial Medical Association “TB Department” and to the Pechersk Police Department of the Main Directorate of the National Police in Kyiv city.

Examples of similar legal situations are the Judgement of Obolonskyi District Court in Kyiv city (Case No. 756/16159/18 of December, 10 2018), Ruling of the Court of Appeal of Kyiv city, Panel of Judges of the Judicial Chamber in Civil Cases (Case No. 757/20496/14, of September 20, 2014), Judgement of the Court of Appeal of Sumy region, Panel of Judges of the Judicial Chamber in Civil Cases (Case No. 587/247/14-ц, of March 3, 2014), Judgement of Cherkasy District Court of Cherkasy region (Case No. 707/2563/18, of November 30, 2018), Judgement of Moscovskiy District Court of Kharkiv city (Case No. 643/17573/18, of December 5, 2018), Judgement of Hosiivskiy District Court of Kyiv city (Case No. 752/7250/20, of May 28, 2020), Judgement of Samarskyi District Court of Dnipropetrovsk city (Case No. 201/13059/18, of January 15, 2019), Judgement of Hosiivskiy District Court of Kyiv city (Case No. 752/25787/18, of January 4, 2019), Judgement of Zmiivskiy District Court of Kharkiv region (Case No. 621/3211/18, of December 20, 2018), Judgement of Kirovskiy District Court of Kirovohrad city (Case No. 404/8310/18, of December 4, 2018), Judgement of Khmelnytskyi District Court of Khmelnytskyi region (Case No. 686/22941/18, of November 27, 2018), Judgement of Khmelnytskyi Town and District Court of Khmelnytskyi region (Case No. 686/22939/18, of November 27, 2018), Judgement of Khmelnytskyi District Court of Khmelnytskyi region (Case No. 686/25633/18, of November 28, 2018), Judgement of Khmelnytskyi District Court of Khmelnytskyi region (Case No. 686/25631/18, of November 28, 2018), judgement of the Valkivskiy District Court of the Kharkiv region (in No. 615/1087/19, of October 8, 2020), judgment of the Saksagansky District Court of Khmelnytsky region (in case No. 680/535/20, of July 13, 2020), judgment of the Saksaganskiy District Court of Kryvyi Rih, Dnipropetrovsk region (in case No. 214/7798/20, of November 24, 2020), judgement of the Saksahanskiy District Court of Kryvyi Rih, Dnipropetrovsk region (in case No. 214/4655/20, of July 2, 2020), judgment of the Kozyatinsky City Court of the Vinnytsia region (in case No. 133/1816/20, of July 10, 2020), judgement of the Vinnytsia City Court of the Vinnytsia Region (in case No. 127/22524/20, of November 3, 2020).

It should be noted that: 1) indications for hospitalization of patients with TB, including involuntary hospitalization as an exceptional measure, are enshrined in Annex 2 to the Standard for Health Care in TB, approved on February 25, 2020, No. 530; 2) involuntary hospitalization of persons in respect of whom the court has made the relevant decision, is carried out taking into account the doctor's conclusion for a period of up to 3 months; the term of hospitalization must be specified in the operative part of the judgement; 3) the practice of setting out in court judgements (the operative part) the provisions on binding actions aimed at enforcing the judgement is not widespread. This primarily concerns the bodies of the National Police, which, at the request of the head of the anti-TB facility, provide assistance within their powers in ensuring the enforcement of a court judgement in accordance with part 5 of Art. 11 of the Law of Ukraine "On Combating Tuberculosis". Analysis of judgements suggests that many of them contain no provisions in this context. However, there are those that indicate, for example: "To oblige the police to carry out the forced delivery of the person to the TB facility" or "to send a copy of the judgement to the TB facility and the police office for notification and execution". It seems that in order to effectively ensure the execution of a court judgement, it would still be appropriate to specify a binding provision for the police authority, and Art. 346 of the of the CPC of Ukraine should be amended to ensure that it contains the imperative instruction to send the relevant judgement to the police office for execution. Part 3 of Art. 346 of the CPC of Ukraine states that the court sends the judgement to the relevant local self-government agency to take measures to protect the property of the person, in respect of whom the judgement on involuntary hospitalization is made after its entry into force. There are almost no judgments in which the court fulfils the requirement of the provision in the text regarding the dispatch of the judgement to the local self-government body; 4) the application shall indicate the grounds for hospitalization established by law. The annex to the application must be framed by the doctor's opinion on the need for involuntary hospitalization or on the extension of the period of involuntary hospitalization, indicating the period during which the treatment will be provided. The author believes that: 1) the opinion, according to the literal interpretation of the regulation, can be made by one doctor, but in practice it is often made by a commission; 2) for the validity of the judgement it is necessary to include to the text the doctor's opinion, which is compulsory for this category of cases.

Case No.2

The only statutory method of protection is involuntary hospitalization, which often has a diverse interpretation in court judgements, although the term “hospitalization” has a legal definition.



Judgement of the Court of Appeal of Dnipropetrovsk region consisting of the Panel of Judges of the Judicial Chamber in Civil Cases

*(Case No. 182/2873/1722-ц/774/964/К/18, of June 19, 2018). Open court.
<https://reyestr.court.gov.ua/Review/74909783>*

On June 8, 2016, PERSON_1 – Nikopolskyi Anti-TB Dispensary of the Dnipropetrovsk Regional Council – filed an application with court for compulsory hospitalization of PERSON_2 in the TB facility.

The application was substantiated by the fact that since February 17, 2017, PERSON_2, INFORMATION_1 (residing at: INFORMATION_2) had been registered with Nikopol Anti-TB Dispensary as suffering from an active form of pulmonary TB. PERSON_2 had violated the anti-epidemic regime, and did not appear for inpatient treatment as of March 21, 2017; such a behavior threatened the transmission of TB to others. The patient was informed about the need to adhere to the anti-epidemic regime and the treatment regime at Nikopol Anti-TB Dispensary.

The applicant asked the court: to oblige PERSON_2 to appear for hospitalization in order to undergo treatment at the Inpatient Department of Nikopol Anti-TB Dispensary, to follow the prescriptions of a doctor at the TB facility, to undergo the necessary medical examinations in a timely manner, and to follow the anti-epidemic rules and regulations at Nikopol Anti-TB Dispensary.

In a Judgement of Nikopol District Court of Dnipropetrovsk region on June 15, 2017, the application was granted and PERSON_2, INFORMATION_1 (residing at: INFORMATION_2), was obliged to appear for treatment at the inpatient department of Nikopol Anti-TB Dispensary, at: 17-a, Elektrometalurhiv Str., Nikopol, to follow the prescriptions of an anti-TB facility doctor, to undergo the necessary medical examinations at the appointed time and to adhere to the sanitary-hygienic and sanitary-anti-epidemic rules and regulations at Nikopol Anti-TB Dispensary.

However, this conclusion of the court of first instance cannot be accepted. While obliging PERSON_2, INFORMATION_1, to appear for treatment at the inpatient department of Nikopol Anti-TB Dispensary, to follow the prescriptions of a doctor at the TB facility, to undergo the necessary medical examinations in a timely manner, and to follow the anti-epidemic rules and regulations at Nikopol Anti-TB Dispensary, the court of first instance did not take into account the above mentioned information and the fact that the only judicial measure to prevent the spread of TB allowed by the applicable laws of Ukraine, is compulsory hospitalization of a patient for a period of up to three months.

All in all, the panel of judges came to the conclusion that the applicant – Nikopol Anti-TB Dispensary – had chosen an inappropriate protective measure, therefore, the stated requirements were not subject to satisfaction.

The panel of judges cannot decide on the compulsory hospitalization of PERSON_2 for a certain period, because during the case hearing by the court of appeal, the court of appeal checks the legality and validity of the court of first instance judgement within the limits of the arguments and claims in the appeal and in the statement of claim before the court of first instance, and no such claims were made in the court of first instance.

A similar legal situation can be found in the Judgement of the Court of Appeal of Khmelnytskyi region (Case No. 675/1356/14-ц, of July 28, 2014), Judgement of Chemerovetskyi District Court of Khmelnytskyi region (Case No. 687/1460/18, of December 17, 2018), Judgement of Oleksandriyskyi District Court of Kirovohrad region (Case No. 398/4386/18, of November 28, 2018).

It should be noted that the only protective measure and, therefore, lawful decision as a basis for involuntary hospitalization, in accordance with Art. 11 of the Law of Ukraine “On Combatting Tuberculosis” and Art. 343-346 of the CPC of Ukraine, is a decision on involuntary hospitalization for up to 3 months. Therefore, it is inadmissible, for example, to mention involuntary hospitalization in a special ward of a hospital with restriction of the right to free movement and involuntary inpatient treatment for a period of at least 3 months. In practice, the applicants often indicate the order of compulsory hospitalization, although it is only correct to indicate involuntary hospitalization only.

Case No.3

A rare phenomenon in this category of cases is the deviation of the applicant from the traditional subject of the application. This case was brought by a TB facility, which is charged with medical (dispensary) supervision of the patient, for the prosecutor, who represents the legitimate interests of the state in court.



Ruling of the Court of Appeal of Kherson Region, Panel of Judges of Judicial Chamber in Civil Cases

(Case No. 648/3511/15-u, of November 2, 2015). Open court.

<https://reyestr.court.gov.ua/Review/53218846>

On September 23, 2015, the prosecutor of Bilozerskyi district of Kherson region filed an application to Bilozerskyi District Court of Kherson Region seeking the involuntary hospitalization for a period of 3 months of PERSON_5 to the Kherson Anti-TB Dispensary.

On September 24, 2015, the prosecutor’s application was dismissed, and the applicant was given time to rectify the deficiencies indicated by the court. At the same time, the court noted that the application did not meet the requirements of Art. 119 and 284 of the CPC of Ukraine, namely: a) the application did not indicate who was the representative of the person about whom the possibility of involuntary hospitalization was being considered, including place of residence and means of communication; b) the application did not contain the justifications provided for in Art. 23 of the Law of Ukraine “On the Prosecutor’s Office”, the grounds under which the prosecutor could represent the state in court, in particular the submission by the prosecutor of an application in the interests of the communal enterprise; and c) the application was not accompanied by a reasoned opinion from the medical board on the need for involuntary hospitalization of the person in a TB facility, indicating the period, during which the treatment was to be carried out.

In pursuance of this Ruling, the prosecutor sent a letter to the court, stating that he believed that the application met the requirements of procedural law. The Judge of Bilozerskyi District Court declared the prosecutor’s application unfiled and returned it to the applicant by a Ruling, of October 2, 2015.

The court correctly found that neither the prosecutor’s application, nor his letter contained the justifications for the prosecutor to represent the state in court and notify the relevant public authority provided for in Part 4 of Art. 23 of the Law of Ukraine “On the Prosecutor’s Office”. Also, the prosecutor did not substantiate the submission of the application in the interests of the communal enterprise (Bilozerskyi Central District Hospital) and there was no evidence that the latter could be referred to as the anti-TB facility, which exclusively could have been the applicant in this case. The application did not specify who had represented the person, whose hospitalization was being considered.

The Court of Appeal dismissed the appeal of the Prosecutor of Bilozerskyi district of Kherson region and upheld the Ruling of the Judge of Bilozerskyi District Court of Kherson region of October 2, 2015.

It should be noted that: 1) when clarifying whether the grounds for prosecutor's performance of his/her duties in court are correct, in particular regarding the representation of the legitimate interests of the state in court in the case of a violation or threatened violation of the state's interests (including state and municipal health care facilities), justification must be provided for violation of the state's interests and the need to protect them in a particular case; 2) in Constitutional Court of Ukraine Judgement No. 3-рп/99, of April 8, 1999, the Constitutional Court of Ukraine expressed the opinion, when clarifying the concept of the "state's interests", that the interests of the state differ from the interests of other participants in public relations. The first concept is always based on the need to take national (political, economic, social and other) actions, programmes aimed at protecting the sovereignty; territorial integrity and state border of Ukraine, safeguarding the state's, economic, informational and environmental security; protecting its land as a national good; protecting the rights of all owners and managers of property, and so on. Thus, the interests of the state should be protected first of all by the relevant public authorities, and not by the prosecutor. In order for the interests of the state not to remain unprotected, the prosecutor plays a subsidiary role, replacing in court proceedings the relevant public authority when, contrary to the requirements of the law, it does not provide protection or does so incorrectly. The prosecutor cannot be considered an alternative subject applying with court and substituting a proper public authority that can, and wishes to, protect the interests of the state; 3) similar conclusions are made in Supreme Court judgements of April 25, 2018 (Case No. 806/1000/17); May 7, 2018 (Case No. 910/18283/17); May 10, 2018 (Case No. 918/323/17); July 19, 2018 (Case No. 918/1169/17), and September 20, 2018 (Case No. 296/1237/17).

Case No.4

In practice, in many cases people suffering from TB have concomitant pathologies, including mental disorders. Therefore, there is a dissonance with the choice of a facility to provide care to TB patients. The author believes that, given part 6 of Art. 11 of the Law of Ukraine "On Combatting Tuberculosis" and Chapter 11 of the CPC of Ukraine, such a facility is an anti-TB facility, not a facility for the provision of psychiatric care.



Judgement of the Court of Appeal of Kharkiv Region, Panel of Judges of the Judicial Chamber in Civil Cases

(Case No. 623/2272/14-u, of September 17, 2014). Open court.

<https://reyestr.court.gov.ua/Review/40561574>

In July 2014, Communal Healthcare Facility "Regional Anti-TB Dispensary No. 4" filed an application with the court referring to the fact that during his inpatient treatment PERSON_2, a patient with a contagious form of TB, violated the anti-epidemic regime. On February 12, 2014, he voluntarily left Regional Anti-TB Dispensary No. 4, thus exposing other persons to the TB infection. The applicant asked the court, pursuant to Art. 11 of the Law of Ukraine "On Combatting Tuberculosis", for involuntary hospitalization of PERSON_2 in Communal Healthcare Facility "Regional Psychoneurological Dispensary No. 1" to continue his treatment for 3 months.

By its Judgement of July 25, 2014, Iziium District Court of Kharkiv Region granted the application of the Regional Anti-TB Dispensary No. 4. PERSON_2 was involuntarily hospitalized in Regional Psychoneurological Dispensary No. 1 for 3 months. In an appeal PERSON_1, acting for and on behalf of PERSON_2, referring to the violation by the court of first instance of substantive and procedural law, asked for the judgement to be changed to involuntary hospitalization of PERSON_2 not in Regional Psychoneurological Dispensary No. 1, which is more than 200 km away from his place of residence, but in Regional Anti-TB Dispensary No. 4, where he was treated.

Having heard the judge's report, checked the legality and validity of the judgement within the arguments of the appeal and the claims made in the court of first instance, the Panel of Judges concluded that there were reasons to grant the appeal. Thus, having established that PERSON_2, who was suffering from a contagious form of TB, during his inpatient treatment violated the anti-epidemic regime, thus threatening transmission of TB to others, the Panel of Judges concluded that there were grounds for involuntary hospitalization of PERSON_2 in an anti-TB facility with the appropriate wards to accommodate such patients, namely Regional Anti-TB Dispensary No. 4.

The court ruled to grant the appeal of PERSON_1, acting for and on behalf of PERSON_2, to change the Judgement of Iziom Town and District Court of Kharkiv Region of July 25, 2014, and to order the involuntary hospitalization of PERSON_2 to continue treatment for a period of 3 months at Communal Healthcare Facility "Regional Anti-TB Dispensary No. 4".

This finding is similar to that made in the Judgement of Zmiivskiy District Court of Kharkiv region (Case No. 621/450/17, of March 22, 2017), the Judgement of Zmiivskiy District Court of Kharkiv region (Case No. 621/2863/18, of November 30, 2018), and the Judgement of Zmiivskiy District Court of Kharkiv region (Case No. 621/3211/18, of December 20, 2018).

It should be remembered that, under part 6 of Art. 11 of the Law of Ukraine "On Combatting Tuberculosis", involuntary hospitalization of patients with infectious forms of TB who suffer from mental disorders, is carried out in the manner prescribed by this Law, taking into account the legislation on psychiatric care. In this case, PERSON_2 had a concomitant disease, apparently a mental illness, given the decision of the medical consultative board and the judgement of the court of first instance. The Law contains an imperative provision that compulsory hospitalization shall be carried out in the manner prescribed by the Law of Ukraine "On Combatting Tuberculosis", and therefore there is no alternative to compulsory hospitalization in an anti-TB facility, as confirmed by Chapter 11 of the CPC of Ukraine.

Case No.5

Quite often in practice in this category of cases there is a question of the term of involuntary hospitalization irrespective of the imperative of the provision of part 3 of Art. 11 of the Law of Ukraine "On Combatting Tuberculosis": three months is the maximum time limit.



Judgement of Holoprystanskyi District Court of Kherson region

(Case No. 654/1638/15-u, of June 12, 2015)

<https://reyestr.court.gov.ua/Review/45680104>

Holoprystanska Central District Hospital (CDH) filed an application to the court for involuntary hospitalization in an anti-TB facility of PERSON_2. The application was supported by the applicant's representative, who explained that PERSON_2 was registered with the TB office of Holoprystanska CDH with a diagnosis of: pulmonary TB (since May 2015) multidrug-resistant TB (May 23, 2014) of left lung (infiltrate) Destr + MBT + M + K + Resist + (S, R, E, H) Resist II0 Hist0 Cat4.1A (VDTB, Ir) Kog2 (2014). From May to June 2014, the patient was treated at the Kherson Regional Anti-TB Dispensary. She left the inpatient department without permission, and went to Mala Viska town in Kirovohrad region, where she neither registered with a TB doctor, nor bought medicine for herself. At the time of application filing PERSON_2 was not being treated, had not been admitted to the inpatient department, and was in the 27th week of pregnancy. In this context, a request was made for involuntary hospitalization of PERSON_2 in Kherson Regional Anti-TB Dispensary for a period of not less than 8 months.

According to the extract from the Record No. 3 of the meeting of the Medical Commission of Holoprystanska CDH of May 12, 2015, the patient PERSON_2 had an open form of TB and was posing a threat of spreading this dangerous disease among the healthy population and required involuntary hospitalization and long-term treatment at a TB hospital for at least 8 months.

The court ruled to grant the application of Communal Enterprise Holoprystanska CDH in part and to hospitalize patient PERSON_2, involuntarily in Kherson Regional Anti-TB Dispensary for a period of at least 3 months.

The finding in this case is similar to the Judgement of the Court of Appeal of Kirovohrad region, the Panel of Judges of the Judicial Chamber in Civil Cases (Case No. 22-ц/1190/2769/12, of October 9, 2012), Judgement of Saksahanskyi District Court of Kryvyi Rih city of Dnipropetrovsk region (Case No. 214/8544/18, of December 27, 2018).

In accordance with part 3 of Art. 11 of the Law of Ukraine "On Combatting Tuberculosis", involuntary hospitalization of persons with respect to whom the court has made a judgement, is carried out, taking into account a doctor's opinion, for up to 3 months. Part 2 of Art. 346 of the CPC of Ukraine states that any judgement to uphold the application or extend the period of involuntary hospitalization of a person in a TB facility is subject to the statutory period. Therefore, it is the matter of the imperatively established term due to the determination of the maximum time limit. Analysis of court judgements suggests that the court of appeal can adjust the term, if there are errors of the court of first instance, or the court of first instance can adjust the applicant's claim by granting the application in part.

III. Case law on occupational diseases related to TB

According to the List of Occupational Diseases approved by Cabinet of Ministers of Ukraine Resolution No. 1662, of November 8, 2000, TB is included in the list of occupational diseases. One of the difficult issues in this category of cases is compensation for non-pecuniary damage. According to paragraph 8 of Art. 36 of the Law of Ukraine "On Compulsory State Social Insurance", compensation for moral (non-pecuniary) damage caused by the accidents at work or occupational diseases to victims and their family members is not an insurance indemnity and is carried out regardless of the time of occurrence of the insured event in accordance with the provisions of the CC of Ukraine and the Labour Code of Ukraine. It should be noted that none of these Codes contains minimum or maximum limits for the compensation. Notably, a Resolution of the Grand Chamber of the Supreme Court (Case No. 210/5258/16-ц, of December 5, 2018) clearly defines the basic principles for creating a compensation mechanism, and states:

"89. Moral damage shall be compensated for in cash, other property or otherwise. The amount of monetary compensation for non-pecuniary damage shall be determined by a court depending on the nature of the offence, the depth of physical and mental suffering, the deterioration of the victim's abilities or deprivation of his/her ability to implement them, the degree of guilt of the person who caused the non-pecuniary damage (in case the guilt is a basis for compensation), and any other circumstances that are essential. In determining the amount of compensation, the requirements of reasonableness and fairness shall be taken into account (part 3 of Art. 23 of the CC of Ukraine).

90. In cases of compensation for non-pecuniary damage caused due to the injury or other damage to health, the courts, having established the fact of infliction of non-pecuniary damage, must take special care to ensure that the amount of compensation awarded is commensurate with that damage. The amount of compensation for non-pecuniary damage must be reasoned by the court taking into account, in particular, the criteria set out in part 3 of Art. 23 of the CC of Ukraine and when such compensation is awarded in an amount significantly less than requested by the victim.”

The court ruled to grant in part the cassation appeal of the Office of the Executive Directorate of the Social Insurance Fund for Accidents at Work and Occupational Diseases of Ukraine in Kryvyi Rih, Dnipropetrovsk region, i.e. to reverse the Judgement of the Court of Appeal of Dnipropetrovsk region of April 12, 2017, regarding the apportionment of legal costs in the case; to uphold the Judgement of Dzerzhinsky District Court of Kryvyi Rih, Dnipropetrovsk region of February 8, 2017, in this part. As for the rest of the claims, it was ruled to change the Judgement of the Court of Appeal of Dnipropetrovsk region of April 12, 2017, and the Judgement of Dzerzhinsky District Court of Kryvyi Rih, Dnipropetrovsk region of February 8, 2017, by recovering UAH 275,000 instead of UAH 70,000 in favor of PERSON_3.

In its Judgement in the case of Kucheruk v. Ukraine, the ECtHR emphasizes the probabilistic dimension of non-pecuniary damage, which ultimately, as stated in legal doctrine, should prompt domestic courts to consider the validity of the rigid requirements they usually make for the organization of the parties' efforts to prove non-pecuniary damage and the amount of compensation appropriate. In the case of Melnychenko v. Ukraine the ECtHR stated that non-pecuniary damage shall be assessed with reference to the autonomous criteria it has derived from the Convention, not on the basis of the principles defined in the law or practice of the State concerned.

Case No.1



***Judgement of Zhovtnevyi District Court of Kryvyi Rih city,
Dnipropetrovsk region (Case No. 212/6736/19, of November 17, 2020)***
<https://reyestr.court.gov.ua/Review/87620559>

On August 12, 2019 the plaintiff PERSON_1 filed the claim with the court asking the court to recover from Kryvyi Rih Iron Ore Plant (Kryvorizkyi Zaliznorudnyi Kombinat) Public Joint Stock Company (hereinafter, Kryvbaszalizrudkom PJSC) non-pecuniary damage caused by it to the sum of UAH 100,000 from the Department of the Executive Directorate of the Social Insurance Fund of Ukraine in Dnipropetrovsk region represented by the Kryvyi Rih Office of the Department of the Social Insurance Fund of Ukraine in Dnipropetrovsk region (hereinafter, the Fund's Office) non-pecuniary damage caused by it to the sum of UAH 100,000, referring to the fact that he worked between 1993 and 2002 as an underground miner at Kryvbasshakhtobud, Pervomaiska and Gvardiyska mines, Kryvbasshakhtobud trust in dangerous conditions. As a result of long-term work at the enterprises with harmful working conditions, he contracted an occupational disease, second-stage vibration disease with severe peripheral angiodystonic syndrome. The court found, and the case materials confirmed, that the plaintiff PERSON_1 worked between February 1, 1993, and March 19, 2002, at the Kryvbasshakhtobud, Pervomaiska and Gvardiyska mines, under the Kryvbasshakhtobud trust, whose successor is Kryvbaszalizrudkom PJSC, as confirmed by a copy of his employment record book. He voluntarily retired from the job on March 19, 2002 (according to the copy of employment record book).

According to the Report on Investigation of a Chronic Occupational Disease No. 66, of December 25, 2001, the Mine Construction Department at Kryvyi Rih Iron Ore Plant LLC, conducted an investigation into the circumstances of PERSON_1's occupational disease, namely second-stage vibration disease with severe peripheral angiodystonic syndrome. The infiltrative TB of the lower lobe of the left lung, the compaction phase, occurred as a result of work in the presence of harmful production factors for 21 years as a miner drilling shafts, horizontal mine work, drilling screws, and cleaning rocks with trucks. It was not detected anybody's guilt.

The occupational disease was diagnosed in the plaintiff on February 5, 2002. Therefore, the right of the victim to compensation for damage caused to health was linked to the occurrence of a condition insured under the Law of Ukraine “On Compulsory State Social Insurance”.

The Constitutional Court of Ukraine in part 9 of paragraph 5 of the statement of reasons of Judgement No. 20-пн/2008, of October 8, 2008, drew attention to the fact that the provisions of paragraph 1, part 3 of paragraph 5, paragraph 9, part 3 of paragraph 10, and paragraph 11 of section I of the Law of Ukraine “On Amendments to the Law of Ukraine ‘On Compulsory State Social Insurance against Accidents at Work and Occupational Diseases Causing Disability’” abolished the right of insured citizens who suffered at work from an accident or occupational disease to a compensation for non-pecuniary damage at the expense of the Fund, which they had in accordance with the provisions of the original version of Law No. 1105-XIV. However, it noted that the right of these citizens to compensation for non-pecuniary damage was not violated, as Art. 1167 of the CC of Ukraine and Art. 237-1 of the Labor Code of Ukraine entitled them to compensation for non-pecuniary damage at the expense of the owner or its authorized body (the employer).

Therefore, the court was of the opinion that the disputed legal relationship should be governed by Law No. 1105-XIV in the wording applicable at the time when the plaintiff suffered the non-pecuniary damage in connection with the insured event, which provided that the obligation to compensate such damage rests with the Fund. Therefore, the defendant’s allegations that the Fund was not the proper defendant in the case were unfounded. Similar conclusions are set out in the Grand Chamber of the Supreme Court Resolution in case No. 210/3177/17, of November 20, 2019. The court ruled to recover non-pecuniary damages of UAH 80,000 from the Office of the Executive Directorate of the Social Insurance Fund of Ukraine in Dnipropetrovsk region represented by the Kryvyi Rih Office of the Department of the Social Insurance Fund of Ukraine in Dnipropetrovsk region for PERSON_1 without withholding personal income tax. The claims of PERSON_1 against Kryvyi Rih Iron Ore Plant PJSC were dismissed.

Similar findings were made in the Judgement of the Court of Appeal of Luhansk region of the Panel of Judges of the Judicial Chamber in Civil Cases (Case No. 413/2031/13-ц, of November 7, 2013), the Judgement of Industrialnyi District Court of Dnipropetrovsk city (Case No. 202/3980/19, of January 21, 2020), ruling of the Supreme Court of the First Court Chamber of the Cassation Civil Court (in case No. 202/3980/19, of July 13, 2020), ruling of the Volynskiy Court of Appeals (in case No. 161/9531/19, of July 14, 2020), and the Judgement of Lutsk District Court of Volyn region (Case No. 161/9531/19, of April 28, 2020).

Case No.2



Judgement of Artemivskiy District Court of Donetsk region

(Case No. 219/12993/18, of January 29, 2020). Open court.

<https://reyestr.court.gov.ua/Review/87809201>

The plaintiff filed a claim with the court against the Main Directorate of the National Police in Donetsk region, represented by Bakhmut Division of the Police in Donetsk region for declaring unlawful the acts and obligation to take certain actions. In support of the claims, it is stated that he was hired by the internal affairs agencies on April 15, 2009. During his service in 2010, he underwent lung surgery twice. On October 11, 2016, while performing his official duties, he suddenly suffered a deterioration in his health, which he reported to his immediate superior and then independently sought medical help for.

After examination by a doctor, he was sent to an anti-TB facility, where he has had inpatient treatment between October 20, 2016, and November 14, 2016. As he was diagnosed with pulmonary TB, on October 21, 2016, the health care facility where he had been undergoing treatment sent a letter to his place of work, Bakhmut Police Division, requesting to provide written information about persons who had been in contact with him, in order to prevent the spread of the dangerous infection and take preventive measures.

On completion of his treatment at the inpatient department he returned to work, and in order to ensure he was fit for further service as chief of the Bakhmut Police Division, he was sent to the military medical commission of Donetsk Department "Territorial Medical Association of the Ministry of Internal Affairs of Ukraine in Donetsk region". The examination led to the conclusion that his contracting of the disease was associated with his service in the police.

The defendant did not conduct an internal investigation and therefore filed a complaint with the senior management and the Commissioner of the Verkhovna Rada of Ukraine for Human Rights. As a result of his complaints a commission was set up to investigate the circumstances in which he contracted the disease. However, no investigation was conducted and no conclusions were drawn. By a Judgement of the Donetsk District Administrative Court, on February 15, 2018, his claim was satisfied, and the Main Directorate of the National Police in the Donetsk region was obliged to draw up a report on the investigation into the circumstances behind the disease of PERSON_1. In pursuance of the judgement, the defendant investigated the incident and drew up the relevant reports. According to the conclusion of the report prepared in form H-5*, of March 19, 2018, the incident with the plaintiff occurred during service and was not connected with the performance of his official duties. He believes that reports were drawn up in violation of the established procedure, and that the conclusions in the reports were premature and made without clarification of all the circumstances of the case. He asks the court to accept his claim. The investigation found that on March 19, 2018, a report on the investigation of the incident was issued in form H-5* and Report No. 1 was approved in form HT*, according to which the plaintiff contracted the disease during his service and it was not related to the performance of his official duties, was a chronic disease and belonged to the category of common diseases.

In addition, during the investigation, the plaintiff provided explanations in which he noted that during the direct performance of official duties, conducting a pre-trial investigation into criminal proceedings, he came into contact with persons suffering from open TB. At the same time, the plaintiff himself drew attention to the fact that he had applied the necessary personal hygiene measures when contacting persons suffering from TB.

Given the circumstances of the accident and the arguments of the victim that the report on the incident outside work did not provide adequate justification that the disease was not related to the plaintiff's direct duties while working for the defendant. However, no documents were presented to the court confirming that the commission had investigated the plaintiff's disease and that it was related directly to the performance of his duties. There were no references to such documents in the accident investigation report of March 19, 2018.

In the said circumstances, the court found that the plaintiff duly proved the need to declare unlawful and repeal the report drawn up in form H-5* by the Bakhmut Police Division of the Main Department of the National Police in Donetsk region of March 19, 2018, on the investigation of the event that occurred between February 25, 2010, and May 11, 2016, to the inspector of the Investigation Office of the Bakhmut Division of the Main Department of the National Police in the Donetsk region – police lieutenant PERSON_1, according to whose conclusion the incident occurred during service and was not connected with the performance of official duties; to declare unlawful and repeal Report No. 1, which was drawn up by the Bakhmut Police Division of the Main Department of the National Police in Donetsk region of March 19, 2018, in form HT* on an incident outside work that occurred between February 25, 2010, and May 11, 2016, with the inspector of the Investigation Office of the Bakhmut Division of the Main Department of the National Police in Donetsk region – police lieutenant PERSON_1, and to oblige the Main Department of the National Police in Donetsk region represented by the Bakhmut Police Division in Donetsk region, on an incident that occurred between February 25, 2010, and May 11, 2016, with an inspector from the Investigation Office of the Bakhmut Division of the Main Department of the National Police in Donetsk region – police lieutenant PERSON_1, in accordance with the Procedure for investigating and reporting on incidents,

occupational diseases and accidents that occurred in agencies and units of the Ministry of Internal Affairs (MIA) system, approved by Ministry of Internal Affairs of Ukraine Order No. 1346, of December 27, 2002, to draw up reports in the form H-5* and H-1*, as the accident investigation commission neither analysed the written evidence provided by the plaintiff on the circumstances directly related to this case, nor did the commission rebut certificate of illness No. 565/CHП, of May 22, 2017, which clearly established that the plaintiff's disease directly related to his service in internal affairs agencies. Thus, the commission did not refute the direct cause-and-effect relation between the fact that the plaintiff worked for the defendant and, as the result of his work, received a disease that no longer allowed him to work and made him subject to dismissal due to the illness while working for the defendant, and therefore, in this part the claims should be granted on the above grounds. The court ruled to grant the claim in part.

It should be noted that: 1) on occurrence of jurisdictional disputes (administrative or civil jurisdiction) the essence of the plaintiff's right to access to a court and to an effective remedy as guaranteed by the Convention may be jeopardized; 2) in the event of a jurisdictional conflict, it is expedient to take into account the legal position of the Grand Chamber of the Supreme Court, which is set out in the Judgement in case No. 711/10371/17, of August 21, 2019.

IV. Case law on various types of legal relations in the field of TB

Case No.1



Judgement of Zakarpatskyi Court of Appeal consisting of the Panel of Judges of the Judicial Chamber in Civil Cases
(Case No. 308/10493/14-a, of November 6, 2018). Open court.
<https://reyestr.court.gov.ua/Review/77904482>

In August 2014 PERSON_1 filed a claim with the court against the TB Regional Clinical Territorial Medical Association (TB RCTMA) declaring the actions of the defendant illegal and unlawful. PERSON_1 argued that on May 30, 2011, his mother, PERSON_2, was taken to the Uzhhorod TB RCTMA on suspicion of pulmonary TB, without her consent and without the consent of any of her relatives. Medical documentation from the Uzhhorod TB RCTMA did not contain the signature of PERSON_2 or any of her relatives on consent to be placed in the defendant's hospital or on consent to treatment in the defendant's hospital. In addition, consent signatures in the defendant's medical documentation were provided for PERSON_2 by employees of the facility.

At Uzhhorod TB RCTMA, numerous chemicals were administered to PERSON_2 by the defendant's employees for 12 days, between May 30, 2011, and June 10, 2011. Each time the chemicals were administered, every day for 12 days, consent signatures were provided in the defendant's medical documentation for the plaintiff's mother PERSON_2 by the defendant's employees. The medical documentation of Uzhhorod TB RCTMA contained no signature from PERSON_2 or her relatives on consent for administering any chemicals to her.

Since PERSON_2 did not give any consent to the treatment at the defendant's facility and did not provide any signature, on June 7, 2011, the defendant's employees called a psychiatrist from the A. Novak Regional Clinical Hospital, who unreasonably gave her a false diagnosis: vascular dementia (i.e. imbecility), and recommended that PERSON_2 be sent for treatment to the Regional Psychiatric Hospital in Vilshany village, Khustskyyi district, Zakarpattia region.

On the recommendation of a psychiatrist from the A. Novak Regional Clinical Hospital, without receiving any consent, on June 10, 2011, employees of the defendant transported PERSON_2 from the hospital Uzhhorod TB RCTMA to the Regional Psychiatric Hospital in Vilshany, Khustskyyi district, Zakarpattia region. In addition, not long before that, in the evening of June 8, 2011, mobile communication with PERSON_2 was interrupted in the hospital, and none of her relatives and acquaintances were able to reach the plaintiff's mother by mobile phone before her death.

By Judgement of Uzhhorod City and District Court, on March 13, 2015, the claim of PERSON_1 was dismissed.

Having heard the explanations of PERSON_1 and his representative, PERSON_3, who supported the arguments set out in the appeal, the representative of Uzhhorod TB RCTMA – PERSON_4, who asked the court to uphold the Judgement – having examined the case files, the panel of judges believed that the appeal should not be granted for the following reasons.

The case files revealed that on May 30, 2011, PERSON_2 was delivered by ambulance to TB RCTMA, where the patient was also X-rayed, and the X-ray revealed pathological changes in the form of focal-infiltrative shadows of the drain nature, apical cavity of 7.3 cm in diameter. According to part 1 of Art. 9 of the Law of Ukraine "On Combatting Tuberculosis", in if any signs of TB are detected in a person or if there is a request by an exposed person, the health care worker shall be required to send him/her for further examination to a TB specialist or to the appropriate anti-TB facility.

The forensic psychiatric expert conclusion No. 553, of October 10, 2016, conducted following a July 12, 2016, Ruling of the Court of Appeal of Zakarpattia region by the Communal Facility Lviv Regional Clinical Psychiatric Hospital, Lviv, established on examination of a photocopy of the medical record of an inpatient of Uzhhorod TB RCTMA that PERSON_2 was sent to this facility by the outpatient department of the Zakarpattia Regional TB Dispensary, with the diagnosis of infiltrated TB. She was admitted for inpatient treatment on May 30, 2011.

According to the inpatient medical record, PERSON_2 was receiving inpatient treatment at Vilshanska Psychiatric Hospital from June 10, 2011. On admission PERSON_2 provided her informed written consent for inpatient psychiatric care (a personal signature confirmed by Conclusion of the Forensic Examination with the study of handwriting and signatures No. 2423). The conclusion of the forensic psychiatric examination states that the information available in inpatient medical record No. 541/2011 of Uzhhorod TB RCTMA was insufficient to diagnose vascular dementia in PERSON_2.

Patients with vascular dementia, depending on the severity of the dementia, may be able to understand information provided in an accessible manner and provide informed consent under Art. 1 of the Law of Ukraine "On Psychiatric Care". The court ruled that the appeal of PERSON_1 should be dismissed and upheld the Judgement of Uzhhorod City and District Court, of March 13, 2015.

It is important to note the following: 1) Art. 10 of the Law of Ukraine "On Combatting Tuberculosis" refers to the mandatory conditions for anti-TB treatment, including written informed consent for treatment of the patient or his/her legal representative or guardian. It appears that this had not been secured, as there is only a reference to the informed consent to psychiatric care. There was also no court judgement on involuntary hospitalization. In the absence of such informed consent and a judgement on involuntary hospitalization, provision of medical care in a TB health care facility cannot be deemed as legitimate.

Treatment without informed consent can only be legitimate in case of a direct threat to a person's life pursuant to part 5 of Art. 284 of the CC of Ukraine and part 2 of Art. 43 of the Fundamentals; 2) nowadays, there is no statutory form for informed consent of the patient in special cases, because MOH of Ukraine Order No. 620, of September 4, 2014, which contained such a form, expired, and MOH of Ukraine Order No. 530, of February 25, 2020, did not fix it. Therefore, the form provided for by MOH of Ukraine Order No.110, of February 14, 2012: reporting form No. 003-6/o "Informed voluntary consent of a patient to diagnostics, treatment and surgery and analgesia" or the form "Informed voluntary consent of a patient to diagnostics and treatment in accordance with the new guidelines"; approved by MOH of Ukraine Order No. 751 "On the creation and implementation of medical and technological documents for the standardization of medical care in the MOH of Ukraine system" of September 28, 2012, shall apply. The latter shall be used if TB treatment is based on new guidelines.

Case No.2



Judgement of the Obolonskyi District Court of Kyiv city

(Case No. 756/2466/14-c, of April 30, 2014). Open court.

<https://reyestr.court.gov.ua/Review/38526010>

In February 2014, the plaintiff filed a claim with a court against the Main Department for Emergencies of the Executive Body of the Kyiv City Council (Kyiv City State Administration) for providing housing out-of-turn. Kyiv City Council was involved in the proceedings as a third party.

In support of the claims, the plaintiff indicated that he was a participant in the liquidation of the accident at Chornobyl Nuclear Power Plant (NPP) and was on the list of persons in need of better living conditions since December 28, 2004, in the preferential queue under category I "Victims of the Chornobyl NPP accident". In 2011, he was diagnosed with an active form of TB with the release of mycobacteria. According to a medical report of medical consultative board No. 43, he could not live with his family members. For this reason, he repeatedly appealed to various authorities to provide him, as a person with a severe chronic infectious disease, with separate housing, as set forth by item 3 of paragraph 44 of the Rules of registration of citizens in need of improved living conditions and housing in the Ukrainian SSR, approved by Council of Ministers of the USSR and Ukrprofrada Resolution No. 470, of December 11, 1984. However, the issue of improving the living conditions of the plaintiff remained unresolved.

Living with a family of six persons created conditions for the transmission of TB to the whole family and contributes to active spread of the disease.

Having examined the written evidence in the case, the court reached the following conclusion. In the case files, the plaintiff indicated that he was a participant in the liquidation of the accident at Chornobyl NPP and had been on the list of persons in need of better living conditions since December 28, 2004, in the preferential queue under category I. In 2011, the plaintiff was diagnosed with an active form of TB with the release of mycobacteria. According to the medical report from medical consultative board No. 43, the plaintiff could not live with his family members. For these reasons, the plaintiff repeatedly appealed to various authorities to provide him as a patient with a severe chronic infectious disease, with separate housing.

Paragraph 10 of Art. 20 of the Law of Ukraine "On the Status and Social Protection of Citizens Affected by the Consequences of the Chornobyl Disaster" provides that persons classified in category I who are in need of better living conditions (including the families of victims or deceased citizens) should be provided with housing out-of-turn.

The persons specified in this paragraph shall be provided with living space within a year of the date of the application submission, and local councils should annually allocate 15 per cent of all constructed housing (including enterprises, institutions, organizations regardless of their form of ownership) for this purpose. Violation of this time limit for housing provision can give an individual ground for filing a claim at a court for protection of the violated right. More than 9 years have passed since the plaintiff was registered as a person in need of housing out-of-turn.

From the case files it can be seen that the plaintiff was diagnosed with an active form of TB with the release of mycobacteria and, in accordance with medical report No. 2, of March 5, 2013, this disease is in the list of chronic diseases (Annex 1 to Ministry of Health of the USSR Order No. 52, of February 8, 1985), Section VI, paragraph I, which states that PERSON_1 cannot live in the same room as members of his family, in particular in an isolated apartment, and cannot live in a communal apartment. PERSON_1 suffers from active TB, as provided for by paragraph 1 of Ministry of Health of the USSR Order No. 330, of February 28, 1983, and in accordance with item 3 of paragraph 44 of the Rules is entitled to priority housing.

The Court ruled to grant the claims of PERSON_1 against the Main Department for Emergencies of the Executive Body of the Kyiv City Council (Kyiv City State Administration), and the third party (Kyiv City Council) for providing housing out-of-turn. The Main Department for Emergencies of the Executive Body of the Kyiv City Council (Kyiv City State Administration) was obliged to provide PERSON_1 with separate isolated housing out-of-turn.

Case No.3



Verdict of Snihurovskiy District Court of Mykolaiv region

(Case No. 1-kp/485/18/16, of April 29, 2016). Category: part 3 of Art. 27, part 3 of Art. 358, part 1 of Art 28, part 1 of Art. 366 of the CrC of Ukraine
<https://reyestr.court.gov.ua/Review/57510259>

PERSON_1, INFORMATION_1, born in INFORMATION_2, Ukrainian, citizen of Ukraine, INFORMATION_3, married, working as a head of the department, a TB doctor in the TB Department of the Special TB Hospital of Ukraine in Snihurivskiy Reformatory Colony (RC) No. 5, Department of the State Penitentiary Service of Ukraine in

Mykolaiv region, resident of INFORMATION_4, with no previous convictions, was accused of committing crimes under part 3 of Art. 27, part 3 of Art. 358, part 1 of Art. 28, part 1 of Art. 366 of the CrC of Ukraine.

By Order No. 99 of the Department of the State Penitentiary Service of Ukraine in Mykolaiv region of July 17, 2012, a special medical commission was formed and operated, which is a special body consisting of specialty care providers, for the purpose of conducting examinations of prisoners who fell ill in their places of imprisonment, and also persons who fell ill before conviction and whose diseases as a result of progression have acquired the character specified in the List of diseases of being the basis for filing materials with court for the release of convicts from further imprisonment approved by joint Order of the State Department for the Execution of Sentences and the MOH of Ukraine No. 3/6, of January 18, 2000, "On approval of regulations on medical and sanitary provision of persons detained in pre-trial detention centers and penitentiary institutions of the State Department of Ukraine for the Execution of Sentences" (hereinafter, the List).

The accused, PERSON_1, acting in violation of the above regulations and his official duties, being an official, intentionally organized the forgery of official documents in order for them to be used by another person, in the following circumstances. On February 28, 2013, PERSON_7, INFORMATION_5, convicted on September 22, 2010, by Yuzhnoukrainskyi City Court of Mykolaiv region under part 2 of Art. 185, part 2 of Art. 289, Art. 70 of the CrC of Ukraine to 5 years of imprisonment, arrived at Snihurivska RC No. 5 to serve his sentence. On the same day he was placed in the TB department of the specialized TB hospital at Snihurivska RC No. 5, and following a medical examination received the diagnosis: "First diagnosed pulmonary TB (March 6, 2013), destruction+ MBT+, Smear+. Culture +, Histology 0, Category 1, Cohort 1 (2013), DN of III degree".

In order to release the convict from serving a sentence of imprisonment, the accused PERSON_1 ordered subordinate paramedic PERSON_8 to type up on a computer and print out in four copies the conclusion of a special medical commission for medical examination of the convict, PERSON_7, concerning the presence of a disease included in the List, namely: "Progressive infiltrative pulmonary TB, decay and contamination phase, MBT+, TB intoxication syndrome. Respiratory failure of III degree", which did not correspond to the actual state of health of the convict.

On the instructions of PERSON_1, PERSON_8 intentionally, personally in all copies of the conclusions forged the signatures of members of the special medical commission (PERSON_5, PERSON_4 and PERSON_6) and personally recorded "agree" opposite their names, which was not true.

The accused, cognizant that the disease from which PERSON_7 suffered did not fall under the List, and that the signatures in the conclusion of the special medical commission on behalf of its members (PERSON_5, PERSON_4 and PERSON_6) were forged intentionally, contrary to the interests of the service, on July 23, 2013, in a group of persons with other members of the special medical commission, personally signed on his behalf all four copies of the conclusion, and in the fourth copy made a handwritten statement "agree".

The said conclusion, along with a submission by the chief of Snihurivska RC No. 5 regarding the release of the convict PERSON_7 from serving the punishment due to illness, was sent to Snihurivskiy District Court of Mykolaiv region, which by its Ruling of July 25, 2013, released the convict from serving punishment in the form of imprisonment for the unexpired term of 1 year 11 months and 5 days before his recovery.

[PERSON_9 and PERSON_10 – similar actions were committed with regard to these persons as well].

The accused, PERSON_1, pleaded not guilty of the charges brought against him. He explained to the court that he did work in the specified position in Snihurivska RC-5 (on December 31, 2013, he resigned due to retirement as a serviceman, but continued to work as a freelancer). He was a member of the special medical commission and participated in its meetings during the consideration of applications of the hospital doctors, due to the serious illnesses of the convicts. PERSON_5, PERSON_4, PERSON_6 worked with him in the hospital and, as well as him, were members of the medical commission. PERSON_8 worked as a paramedic in the hospital, but PERSON_1, as his immediate supervisor, did not give any instructions regarding forgery of signatures of members of the medical commission regarding the convicts PERSON_7, PERSON_9 and PERSON_10.

Even though the defendant pleaded not guilty of the charge brought against him, his guilt in committing the crime is confirmed by the evidence provided by the prosecution.

Given the above, the gravity of the crimes committed by the accused, which were both minor and serious crimes, and the perpetrator's identity, who received positive references both at work and at his place of residence, the court imposed a punishment as set out in the Articles under which the charges were brought, in the form of imprisonment, applying Art. 75 and Art. 76 of the CrC of Ukraine and exempting him from serving the sentence on probation, considering that such punishment will be sufficient to correct him and prevent the commissioning of new crimes. The court found PERSON_1 guilty of the charges brought against him under part 3 of Art. 27, part 3 of Art. 358, part 1 of Art. 28, and part 1 of Art. 366 of the CrC of Ukraine.

It should be noted that the List of diseases that form the basis for the filing at a court of materials for the release of convicts from further imprisonment (Annex 12), currently in force, relates to the Procedure for providing medical care to convicts, approved by of the Ministry of Justice of Ukraine and MOH of Ukraine Order No. 1348/5/572, of August 15, 2014. In this List, item 1 identifies TB and item 2 – HIV/AIDS.

CONCLUSIONS

1. When considering cases related to data, which contain medical secrets, especially those that are sensitive and concern the HIV status of an individual, it is appropriate to consider cases in *closed court*. Both the CPC of Ukraine of Ukraine (Art. 7) and the CrPC of Ukraine (Art. 27) grant such a possibility. For example, part 2 of Art. 27 of the CrPC of Ukraine states that an investigating judge, a court, may decide to conduct criminal proceedings in a closed court throughout the proceedings or in part only if, in particular, there is a need to prevent disclosure of personal and family life, or if proceedings in open court may result in the disclosure of a secret protected by law. According to part 2 of Art. 162 of the CrPC of Ukraine, legally protected secrets contained in things and documents include information that could constitute medical secrets.

According to the Judgement of the Constitutional Court of Ukraine in the case of the constitutional petition of Zhashkiv District Council of Cherkasy region regarding the official interpretation of the provisions of parts 1 and 2 of Art. 32, and parts 2 and 3 of Art. 34 of the Constitution of Ukraine No. 2-пп/2012, of January 20, 2012, the Constitutional Court of Ukraine, giving an official interpretation of parts 1 and 2 of Art. 32 of the Constitution of Ukraine, considers that information about a person's personal and family life (personal data) means any information about an individual who can be identified or is specifically identifiable, namely: nationality, education, marital status, religious beliefs, health status, financial status, address, date and place of birth, place of residence and stay, etc.; data on personal property and non-property relations of this person with other persons, including family members; as well as information on events and phenomena that have occurred or are occurring in the domestic, intimate, social, professional, business and other spheres of life, except for data on the performance of powers by a person holding a position related to the exercise of functions of the state or local self-government bodies. Such information on individuals and their family members is confidential and may only be disseminated with their consent, except as provided for by law, and only in the interests of national security, economic welfare and human rights.

According to Art. 8 of the ECHR, everyone has the right to respect for his/her private and family life, home and correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and in case it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. According to Art. 17 of the Law of Ukraine "On Enforcement of Judgements and Application of the Jurisprudence of the European Court of Human Rights", when considering cases courts apply the case law of the ECtHR as a source of law. The case law of the Court is the case law of the ECtHR and the European Commission of Human Rights. The Judgement of the ECtHR in the case of *Avilkin and Others v. the Russia* provides: "The ECtHR observes that it has previously held that personal information relating to a patient belongs to his/her private life.... Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. The disclosure of such data may seriously affect a person's private and family life, as well as their social and employment situation, by exposing them to opprobrium and the risk of ostracism. Respecting the confidentiality of health data is crucial not only for the protection of a patient's privacy but also for the maintenance of that person's confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from seeking appropriate treatment, thereby endangering their own health."

2. The issue of *witness immunity* arises in proceedings related to the health of individuals, in particular those related to HIV/AIDS and TB. The new version of the CPC of Ukraine (Art. 70) determines persons who are required by law to keep secret information that was entrusted to them in connection with their official or professional status, as persons not subject to interrogation as witnesses. This refers to both medical workers and other persons working in the field of health care (for example, employees of health care directorates and departments). The issue of witness immunity is closely linked to a person's right to secrecy of his/her health condition.

A clearer statement of the rules with the corresponding safeguard of human rights is provided in the CrPC of Ukraine (paragraph 2 of part 2 of Art. 65), which enshrines the provision that medical workers and other persons who, in connection with the performance of their professional or official duties, became aware of the disease, medical examination, survey and results thereof, intimate and family aspects of a person's life may not be questioned as witnesses about information that constitutes medical secrecy. Exceptions to this professional duty can only be made by persons who has entrusted the above-mentioned persons with information that is a medical secret. The amount of information that can be lawfully disclosed is also determined by the person who provided it, i.e. the patient or the patient's legal representative. It should be emphasized that there is a statutory standard procedure of actions for such exemption from duty, namely the written form of expression of will signed by the person who entrusted the information.

The ECtHR Judgement in *Z. v. Finland*, in particular, addresses the fact that on September 23, 1992, senior doctor L. complained to the parliamentary ombudsman about the court decision ordering him to provide evidence. In an opinion of February 5, 1993, the parliamentary ombudsman expressed the view that the domestic law had not been violated and that the City Court had properly *balanced the public interest in investigating crime against the applicant's interests in protecting the confidentiality of the information in question*. The ECtHR takes into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his/her right to respect for private and family life as granted by Art. 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his/her confidence in the medical profession and in the health services in general. The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the safeguards in Art. 8 of the Convention (see Art. 3 para. 2 (c), 5, 6 and 9 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 1981).

It should be noted that part 4 of Art. 13 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV", stating that information on the results of testing a person for HIV, the presence or absence of HIV in a person can only be disclosed by a medical worker to: a) the person on whom the test was conducted, and in cases and under the conditions established by part 3 of Art. 6 of this Law – to parents or other legal representatives of such a person (i.e. a person under the age of 14); b) other medical workers and health care facilities – exclusively in connection with the treatment of this person; and c) to other third parties – only following court decisions in cases established by law. The disclosure of such information to other medical workers and health care facilities is only permitted with the informed consent of the person living with HIV to the transfer of such information in writing, and only for the purposes related to the treatment of HIV-related diseases, and if the physician's awareness of the patient's HIV status is essential for his/her treatment.

Therefore, it is important to receive from an individual a statement of intent to dispense from duty in writing, when considering criminal proceedings, taking into account part 4 of Art. 13 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of Persons Living with HIV" and paragraph 2 of part 2 of Art. 65 of the CrPC of Ukraine. Despite the fact that Art. 70 of the CPC of Ukraine does not contain witness immunity in the context of information constituting medical secrecy, given the imperative rule in part 4 of Art. 13 of the Law of Ukraine "On Counteracting the Spread of HIV-Related Diseases and Legal and Social Protection of People Living with HIV", it is also necessary to obtain in writing the consent of a person to the processing of any medical data on HIV and AIDS, by analogy with the law on the transfer of such

information to other medical workers. After all, the special Law creates special safeguards for the protection of this sensitive data. In the absence of the consent of an individual in writing to such processing in proceedings of both types, a court order is required to ensure a balance of public and private interests.

3. The analysis of case law and current national legislation clearly shows a number of regulatory shortcomings that need to be addressed in order to ensure that human rights are effectively protected and defended. In particular, the analysis of the legislation of Ukraine and the case law on involuntary hospitalization in TB facilities indicates numerous shortcomings in the national legislation, including the following: a) Chapter 11 of the CPC of Ukraine refers only to involuntary hospitalization, and therefore treatment is not included, which creates a number of problems in practice; b) the reason for involuntary hospitalization is only the person having a contagious form of TB, although the domestic list of particularly dangerous infectious diseases is significant, but their regulation is fragmentary. These shortcomings can be addressed by amending Ukrainian legislation to provide a clear regulatory framework for involuntary hospitalization and treatment. This should not only apply to such a particularly dangerous infectious disease as TB. Consideration of Art. 130 of the CrC of Ukraine also indicates, for example, the inconsistency between the title of the article "Infection with human immunodeficiency virus or other incurable infectious disease" and its content, because part 1 of this article is not about an infection transmission, but is about the knowingly exposing another person to the virus.
4. In accordance with part 5 of Art. 263 of the CPC of Ukraine, the court judgement must be substantiated. Therefore, in the statement of reasons of the judgement legal substantiation of the conclusions of the court must be provided (*Judgement of the Court of Appeal of Sumy region of the Panel of Judges of the Judicial Chamber in Civil Cases in case No. 587/247/14-ц, of March 3, 2014: to change the Judgement of Sumy District Court of Sumy region of February 3, 2014, in terms of legal substantiation of the judgement*).

Some of the key remarks in the conclusions indicate a set of problems that complicate law enforcement in the studied areas: from the regulatory level to the level of understanding of legal categories. Only synergy between proper legislation and correct law enforcement will create a solid human rights foundation and a sense of security through the "legitimate expectations" of each person, because it is about their fundamental rights and fundamental values.

5. When conducting rule-making, law enforcement and law implementation activities, it should be remembered that the terminology should be legal, without stimulating and discriminating against people living with HIV or AIDS. For example, the term "AIDS carrier" is incorrect because the agent being transmitted is HIV, not AIDS. The terms that begin with the words human (person) seem to be correct: person living with HIV, person living with AIDS etc.

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