



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF M.K. v. UKRAINE

(Application no. 24867/13)

JUDGMENT

Art 8 • Private life • Failure by hospital to inform applicant of HIV positive result of blood test performed as part of routine medical check-up to determine whether applicant fit to continue military service • Unlawful disclosure of applicant's HIV-positive status to her mother and her military unit

STRASBOURG

15 September 2022

FINAL

15/12/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of M.K. v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O’Leary, *President*,

Mārtiņš Mits,

Ganna Yudkivska,

Lətif Hüseynov,

Lado Chanturia,

Arnfinn Bårdsen,

Kateřina Šimáčková, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 24867/13) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Ms M.K. (“the applicant”), on 4 April 2013;

the decision to give notice to the Ukrainian Government (“the Government”) of the complaints under Article 8 of the Convention and to declare the remainder of the application inadmissible;

the decision not to have the applicant’s name disclosed;

the parties’ observations;

Having deliberated in private on 22 March and 17 May 2022,

Delivers the following judgment, which was adopted on the latter date:

INTRODUCTION

1. The application concerns an alleged violation of the applicant’s right to respect for her private life under Article 8 of the Convention in that a blood test for human immunodeficiency virus (HIV) was unlawfully performed on her during a regular medical check-up in a military hospital and she was not duly informed of the test’s results. She also complained that the results of the test had been unlawfully disclosed to third parties, including at her place of service.

THE FACTS

2. The applicant was born in 1980 and lives in Mykolayiv. She was granted legal aid and was represented before the Court by Mr M. Tarakhkalo, Ms Y. Titomer, Ms O. Chilutyan and Ms Philippova, lawyers practising in Kyiv.

3. The Government were represented by their Agent, Mr I. Lishchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. HIV TEST AND THE ALLEGED DISCLOSURE OF ITS RESULTS

5. Between 15 November and 4 December 2005 according to the applicant but 2 December 2005 according to the documents in the case file, the applicant, then a contracted border control officer, underwent routine medical check-ups at the hospital of the Southern Regional Department of the State Border Guard Service (“the hospital”) with a view to establishing whether she was fit to continue military service. While at the hospital, a blood test was performed which, on 2 December 2005, revealed that she was HIV-positive. The case file contains a consent form for HIV testing dated 18 November 2005 and signed by the applicant.

6. Following her written request of 2 December 2005, the applicant was discharged from the hospital. In her request she also undertook to follow recommendations given by the doctors and stated that she had no complaints about the hospital staff. She was provided with a discharge report mentioning the tests which had been performed on her and attesting that she was suffering from hepatitis C and other illnesses. Neither the HIV test nor the applicant’s HIV-positive status was mentioned in the report.

7. On 5 December 2005 a military medical panel, presided over by the head of the hospital, issued a certificate of illness (no. 420/34), according to which the applicant was suffering from hepatitis C, HIV and other illnesses. She was therefore deemed unfit for military service by virtue of items 5 (a) and 55 (b) of the Schedule of health disorders and physical disabilities annexed to the Regulation on military medical assessments and medical examinations in the armed forces of Ukraine (“the Regulation”) approved by Ministry of Defence Order no. 2 of 4 January 1994 (see paragraph 25 below). It was written on the top front page of the certificate that it was prohibited to make copies of it, handle it to anyone or disclose its content.

8. Once approved by the Central Military Medical Commission of the State Border Guard Service (“the CMMC”) as provided for by paragraph 265 of the Regulation, on an unspecified date the certificate was sent to the military unit where the applicant was serving, in accordance with paragraph 261 of the Regulation.

9. On 20 February 2006 the applicant was dismissed from military service “on health grounds”, in accordance with paragraph 85 (b) of the Regulation on military service by soldiers (seamen), sergeants and master sergeants of the armed forces of Ukraine, as in force at the relevant time (see paragraph 26 below).

10. According to the applicant, the HIV test was performed at the hospital without her knowledge or consent. The consent form of 18 November 2005 was signed by her afterwards, among other documents given to her for signature. In her application form, she submitted that the documents had been given to her by the hospital officials “when her diagnosis had been confirmed”; in her comments on the Government’s observations, she stated

that the consent form was among the documents she had signed at her dismissal. She signed the documents without reading them or understanding their meaning, since she trusted the hospital staff and felt unwell. She was never informed by the hospital of the results of the HIV test. She only became aware that she had HIV after she took another HIV test at her mother's request. In her application form, she submitted that she took the test after her dismissal from military service in February 2006, whereas in her reply to the Government's observations, she submitted that she did it in December 2005. According to the applicant, the certificate of 5 December 2005, which contained the full diagnosis, was issued and sent to the CMMC and then to her military unit without her knowledge or consent. Information on her diagnosis was also disclosed by the hospital to her partner, K., who used to come to the hospital and communicate with doctors as regard her state of health, and to her parents, despite the fact that she had never given her consent to informing anyone of her diagnosis; should she have so wished, she could have informed her mother of her HIV-status herself.

11. According to the Government's submission, during the applicant's examination her treating doctor, Kal., started suspecting that the applicant could be HIV-positive and offered her to undergo HIV testing. The applicant agreed having signed the consent form. Once the results of the test became available, the Head of the hospital, in the presence of Kal. and other members of the hospital medical commission, informed the applicant that she was HIV-positive, provided her with recommendations as to further treatment and obtained her oral consent, in view of her poor emotional state, for informing her parents about her health condition. She was also informed that her medical file would be sent to CMMC for approval. The applicant then requested to be discharged from the hospital, having testified that she would comply with doctors' recommendations. Sometime after the applicant's discharge, the applicant's mother arrived at the hospital to talk to doctor Kal. By that time she had already been aware of her daughter's diagnosis, so doctor Kal. confirmed this information to her bearing in mind the applicant's earlier consent for informing her parents.

II. CIVIL PROCEEDINGS AGAINST THE HOSPITAL

12. In May 2008 the applicant instituted civil proceedings before the Primorskyi District Court of Odessa ("the District Court") seeking damages (50,000 hryvnias¹ (UAH)) from the hospital. In those proceedings she essentially gave the same account as that summarised in paragraph 10 above, arguing that the hospital had acted in breach of the requirements of the HIV Infection Control and Protection of the Rights of Persons with HIV Act ("the HIV Act"). Relying on Article 8 of the HIV Act, she argued, in particular,

¹ About 6,700 euros (EUR) at the time.

that the Regulation, which had not the force of law, should not have been applied in her case as information at issue concerned her HIV status and its disclosure had been strictly prohibited by the HIV Act, which provided special protection to HIV-positive persons. She also stated that doctor Kal. informed her both parents of her HIV status once they returned to the hospital after the applicant's mother had been informed by K., the applicant's partner, that the applicant was HIV-positive.

13. According to the record of the hearings at the District Court, the applicant's mother testified that she had learned of the applicant's diagnosis from K. on their way back from the hospital, and that it had then been confirmed to her by Kal., the applicant's doctor. When she had asked K. how he had become aware of her daughter's diagnosis, he had replied that he might have guessed or been provided with that information but had given no further details. She also stated that she had informed the applicant's father of their daughter's diagnosis some six months after she became aware of it herself. At the applicant's requests, the court summoned K. as a witness for the applicant but he never appeared. According to the applicant, he was not willing to testify.

Relying on the consent form signed by the applicant and her request for discharge from the hospital, the hospital officials argued before the court that she had been duly informed of the test and its results. They denied providing any information on her diagnosis to her partner. Her doctor, Kal., testified and admitted having informed the applicant's mother of the applicant's diagnosis but submitted that she had done so with the applicant's oral consent and on account of her serious psychological and emotional condition. According to Kal., the Regulation did not require military medical panels to seek a patient's consent before taking decisions concerning the processing of health-related data. The confidential nature of the data was respected during its processing and all data had been transmitted from one authority to another in a sealed envelope marked "confidential".

14. On 3 November 2011 the District Court rejected the applicant's claim as unsubstantiated. In doing so, it found that the applicant had agreed to undergo the HIV testing by signing the consent form. It also found it established - without relying on any evidence - that the applicant had been informed of the test results. The District Court further noted that military prosecutor's office had checked the applicant's allegations and refused to institute criminal proceedings for the lack of elements of a crime in the actions of the hospital officials. The domestic court concluded that the medical staff of the hospital had duly complied with its obligations under HIV Act by having provided the applicant with HIV- testing and informed her of the test results as well as by informing her of further treatment and warning of criminal responsibility for transmitting the virus to others. It emphasised that when giving her consent to HIV testing the applicant did not insist on its anonymity.

15. The applicant appealed against the judgement of 3 November 2011 to the Odesa Regional Court of Appeal (“the Court of Appeal”), maintaining her complaints. She argued, *inter alia*, that there was no written evidence that she had ever been informed by the hospital of the results of her HIV testing and that she had agreed to disclose information on her health problems to anyone. It transpires from the records of the hearings at the Court of Appeal that the applicant’s representative also objected to the applicability of the Regulation in the context of the disclosure of the applicant’s HIV diagnosis to the military unit, arguing that the latter was inconsistent with the HIV Act which should have been applied in the applicant’s situation.

16. On 6 April 2012 the Court of Appeal dismissed the applicant’s appeal and upheld the judgment of the District Court. It found, in particular, that: (a) the fact that the applicant had given her consent to the HIV testing was proven by her written consent form available in the case-file; (b) according to the Regulations, HIV positive persons were to be declared unfit to military service in peace time; (c) the discharge report provided to the applicant by the hospital did not contain information about her HIV status in order to ensure confidentiality of that information, as required by HIV Act, given that the report was a public document and the applicant had to present it at her military unit; and (d) the certificate of illness (no. 420/34) was drafted by the hospital and sent to the CMMC for approval in accordance with points 261-265 of the Ministry of Defence Order no. 2 of 4 January 1994 which approved the Regulation.

The Court of Appeal decided further that the first-instance court had correctly concluded that the applicant had failed to prove her allegations that information on her HIV positive status had been made known by the hospital officials to third persons. It noted that there was no proof in the case file that the hospital had disclosed any confidential information to K. As regards the applicant’s mother, the Court of Appeal found that it appeared from the mother’s own statement to the District Court that she had already been aware of her daughter’s diagnosis when she had talked to the doctor and that, in addition, the applicant had failed to refute the defendant’s allegation that she had given her oral consent for her mother be informed of her daughter’s diagnosis; no written consent had been required in this regard by law. It went on to note that the applicant did not initiate any compensation proceedings against the hospital until 2008 while information on her HIV status became known to her mother as far back as 2005.

Lastly, the Court of Appeal pointed out that informing the applicant’s parents of their daughter’s diagnosis was aimed at ensuring that the latter was provided with support and necessary psychological assistance and therefore such actions were not a disclosure of the information about HIV.

17. The applicant lodged an appeal on points of law. She maintained, *inter alia*, that: she had never given her consent to HIV testing and signed the consent form backdated; no documents had been provided by the hospital to

show that she had ever been informed of her right to conduct the HIV test anonymously or that she had given her consent to the disclosure of its results to her mother and K. The applicant noted in this respect that she had been in her full legal capacity and required no assistance of third persons to transmit such information to her parents. She also contested the fact that her mother had been aware of her daughter's HIV status when she had talked to the hospital staff.

18. On 19 October 2012 the Higher Specialised Civil and Criminal Court dismissed the applicant's appeal on points of law and upheld the judgments of the lower courts. It found, with a general wording, that the courts had conducted a comprehensive examination and correctly determined the nature of the disputed legal relationships and the applicable law and that the arguments raised in the cassation appeal did not contain any evidence which could put at doubt the courts' conclusions.

III. CRIMINAL PROCEEDINGS AGAINST THE HOSPITAL OFFICIALS

19. According to the applicant, on 6 August 2008 she complained to a military prosecutor's office that information about her HIV diagnosis had been unlawfully disclosed to third parties by the hospital officials. She also alleged that the certificate of 5 December 2005 (see paragraph 7 above) had contained an inaccurate description of her physical conditions.

20. On 29 October 2008 the prosecutor decided not to institute criminal proceedings for lack of *corpus delicti*. Relying on statements given by the hospital officials, the prosecutor established that there had been no evidence that the applicant's health data had been disclosed by the hospital staff to anyone but the applicant's parents. He concluded that as soon as information at issue had been transmitted to the parents with the applicant's consent and in her best interests, there had been no intention of illegally disclosing her personal health data. The applicant, her mother and K. were not questioned by the prosecutor.

21. In January 2009 the applicant appealed against that decision before a court. According to her, that appeal was never examined.

RELEVANT LEGAL FRAMEWORK

22. Under Article 132 of the Criminal Code, disclosure of confidential information about an HIV test and its results by medical personnel and other persons who, in connection with the execution of their professional or official duties, have learned that a person has contracted the illness, is a criminal offence.

23. Pursuant to section 40 of the Law on the Basic Principles of Public Health (Law no. 2801-XII, 19 November 1992, as in force at the relevant time), disclosure of confidential medical information by medical personnel

and other persons who had access to this information in the performance of their professional or official duties was not allowed, except in the situations provided for by law.

Section 70 of the Law provided that the procedure for organising and carrying out medical examinations in the armed forces was to be established by the Cabinet of Ministers of Ukraine.

24. The HIV Act (*Закон України “Про протидію поширенню хвороб, зумовлених вірусом імунодефіциту людини (ВІЛ), та правовий і соціальний захист людей, які живуть з ВІЛ”*) of 1992, as in force at the relevant time, provided as follows.

Section 7 provided that testing for HIV was conducted voluntarily and that the patient had the right to be informed of the test results and to be provided with the relevant recommendations.

Under section 8, HIV testing could be conducted anonymously at the request of the person being tested. Information on the results of the HIV test constituted confidential medical information. Disclosure of such information was allowed only to the person concerned and, in the situations provided for by law, to the person’s legal representatives, medical institutions and the law-enforcement authorities.

Under section 9, if a medical test revealed that a person was HIV-positive, the medical officer of the institution in which the test took place was required to inform that person of the diagnosis, with due respect given to the confidential nature of the information at issue. If HIV-positive person was less than eighteen years old, his or her parents were to be informed of the diagnosis. Pursuant to section 14, an HIV-positive person was required to certify in writing in case he or she had received the information regarding his or her diagnosis.

Under Article 31, disclosure of information on HIV testing and its results by medical personnel and bodies indicated in section 8 entailed liability established by law.

25. The relevant provisions of the Regulation on military medical assessments and medical examinations in the armed forces of Ukraine, approved by Ministry of Defence Order no. 2 of 4 January 1994 (valid until 28 November 2008) may be summarised as follows.

Military medical assessments were conducted by regular (*штатними*) and *ad hoc* (*позаштатними*) military medical panels (point 4), which were guided in their work by the Regulation, other documents concerning military medical assessments, as well as instructions of the Ministry of Defence’s military medical department and those of the Central Military Medical Panel (point 5). Regular military medical panels were considered to be specialised military medical institutions (point 6) which, *inter alia*, examined and approved the decisions of other military medical panels (point 13). The Central Military Medical Panel was a regular military medical panel (point 14). Decisions of military medical panels were based on the Schedule

of health disorders and physical disabilities annexed to the Regulation (point 75). If a routine medical check-up of a military officer revealed an illness which made her unfit (partly or totally) for military service, she would be referred by the head of the relevant military hospital for a medical examination by a military medical panel, with the relevant information added to her certificate of illness (point 146). A certificate of illness would be drawn up in respect of officers who had been declared unfit for military service (point 262). The certificate had to be approved by a regular medical panel (point 265) and would be sent for approval within five days of the medical examination (point 261). Within two days of approval by the regular medical panel, the certificate would be sent to the commander of the military unit of the officer who had undergone the examination or the person who had sent the officer for a medical examination (point 261).

In accordance with item 5 (a) of the Schedule of health disorders and physical disabilities annexed to the Regulation, officers certified by a military medical panel as suffering from HIV or HIV-related conditions would be declared unfit for military service (partly or totally). Item 55 (b) provided that fitness for military service of persons suffering from different gastrointestinal diseases of moderate intensity would be defined on an individual basis.

26. Pursuant to the Regulation on military service by soldiers (seamen), sergeants and master sergeants of the armed forces of Ukraine, approved by Presidential Decree no. 1053/2001 of 7 November 2001, as in force at the relevant time, the conclusion of a military medical panel that a person was unfit for military service on health grounds would lead to termination of the service contract and dismissal of the person concerned (paragraph 85 (B)). The dismissal order would be issued by the commander entrusted with issuing such orders (point 93).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

27. The applicant complained that the HIV test had been performed on her without her prior consent and that the hospital had concealed its results. She further complained that the hospital staff had disclosed information about her health to her mother and partner, as well as to the administration of her military unit. She relied on Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. 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 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.”

A. Submissions by the parties

28. Relying on her version of events (see paragraph 10 above), the applicant contested the facts as established by the domestic courts and maintained that the interference with her private life had been unlawful because the hospital’s actions had been contrary to the provisions of the HIV Act. She had neither received any clarification as to the purpose of frequent blood testing at the hospital, nor had been informed of her right to undergo an HIV test voluntarily and anonymously; no written evidence to the contrary had been provided by the hospital in this respect. Likewise, no written proof was made available by the defendant to show that she had been informed of the results of her HIV testing or that she had ever given any consent for disclosure of confidential information on her health to other persons. If she had so wished, she would have informed the ones she had wanted herself. The fact that the hospital had disclosed confidential information to her partner, her mother and at her place at work had caused her emotional suffering and distress. Furthermore, providing information on her HIV-positive status to her military unit had been unnecessary since chronic hepatitis C, from which she was also suffering, could have served a sufficient ground for her dismissal under the Regulation. Moreover, only four months had remained until the expiry of her employment contract, and her HIV status, in view of the nature of the work she had performed, had represented no threat to anyone’s health or rights.

29. Referring to their account of the events which was based on the findings of the domestic courts, the Government asserted that the applicant’s complaints of unlawful HIV testing, the failure to inform her of the test results and the disclosure of her health data to her mother and K. were manifestly ill-founded. They further submitted that disclosing information on the applicant’s HIV-positive status at her place of service had constituted an interference with her private life. However, the interference was lawful since processing of her health data had been carried out in accordance with the Regulation in the context of assessment of her fitness for military service. It was made in the interests of national security and public safety as well as in the applicant’s own interests as her dismissal would have allowed her to duly take care of herself and follow the necessary medical treatment. The confidential nature of the data at issue had been respected at all times.

B. The Court's assessment

1. Admissibility

30. The Court observes at the outset that it has not been contested by the Government that the hospital was a public institution and that the acts and omissions of its administration and medical staff were capable of engaging the responsibility of the respondent State under the Convention (see *Glass v. the United Kingdom*, no. 61827/00, § 71, ECHR 2004-II; *I. v. Finland*, no. 20511/03, § 35, 17 July 2008; and *Avilkina and Others v. Russia*, no. 1585/09, § 31, 6 June 2013).

31. Turning to the applicant's complaint that the HIV testing was not consented to, the Court notes that the case file contains the written consent to the testing dated 18 November 2005 and signed by the applicant, which had also been referred to by the domestic courts in their decisions. The applicant's argument that she had signed the consent form backdated and without reading or understanding its sense is not convincing and not supported by any evidence. Her submissions as to the circumstances in which she had signed the consent form are also inconsistent (see paragraph 10 above). In any event, it was incumbent on her to apprise herself of the content of official documents. This she could have done without much difficulty. It was open to her to seek the assistance of a family member or a third person, if needed. It follows that this complaint is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

32. As regards the alleged disclosure of information about the applicant's state of health to her partner, K., the Government disputed that such disclosure took place. It appears from the case file that during the civil proceedings in the applicant's case the hospital staff likewise denied having transmitted any health-related information to K., while the applicant's mother submitted that it had been K. who had informed her of her daughter's diagnosis without however revealing the source of that information (see paragraph 13 above). In her cassation appeal, though, the applicant denied the fact that her mother had been aware of her daughter's HIV status when she talked to the applicant's treating doctor and received the relevant information from her (see paragraph 17 above). K. had failed to appear at the hearing before the District Court as he was not willing to testify (see paragraph 13 above) and the Court of Appeal found no evidence in the case file in support of the applicant's allegation that K. had been informed at the hospital of the applicant's diagnosis (see paragraph 16 above). In these circumstances and on the basis of the case file as it stands, the Court has no sufficient elements to conclude in the applicant's favour that K. had been aware of the applicant's HIV status and that this information had been disclosed to him by the hospital officials. This part of the application must therefore be also rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

33. As regards the applicant's remaining complaints, the Court finds that they are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, nor are they inadmissible on any other grounds. They therefore must be declared admissible.

2. Merits

(a) General principles established in the Court's case-law

34. The Court reiterates that personal information relating to a patient belongs to his or her private life (see, for example, *I. v. Finland*, no. 20511/03, § 35, 17 July 2008, and *L.L. v. France*, no. 7508/02, § 32, ECHR 2006-XI). The protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 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 or her confidence in the medical profession and in the health services in general (see *Z v. Finland*, 25 February 1997, § 95, *Reports of Judgments and Decisions* 1997-I; *P. and S. v. Poland*, no. 57375/08, § 128, 30 October 2012; and *L.H. v. Latvia*, no. 52019/07, § 56, 29 April 2014). Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community. 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 guarantees in Article 8 of the Convention (see *Z v. Finland*, cited above, § 95). The right to privacy and other considerations also apply particularly when it comes to protecting the confidentiality of information relating to HIV, as the disclosure of such information can have devastating consequences for the private and family life of the individual and his or her social and professional situation, including exposure to stigma and possible exclusion (*ibid.*, § 96).

35. The Court previously found that the disclosure – without a patient's consent – of medical records containing highly personal and sensitive data about a patient by a clinic to the Social Insurance Office, and therefore to a wider circle of public servants, constituted an interference with the patient's right to respect for private life (see *M.S. v. Sweden*, 27 August 1997, § 35, *Reports* 1997-IV). The disclosure of medical data by medical institutions to, *inter alia*, a patient's employer was also held to have constituted an interference with the right to respect for private life (see *Radu v. the Republic of Moldova*, no. 50073/07, § 27, 15 April 2014).

36. Any interference with an individual's Article 8 rights can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which that paragraph refers and is necessary in a democratic society in order to achieve any such aim (see *Azer Ahmadov v. Azerbaijan*, no. 3409/10, § 63, 22 July 2021).

37. The wording "in accordance with the law" requires the impugned measure both to have some basis in domestic law and to be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and inherent in the object and purpose of Article 8. The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his or her conduct (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 95, ECHR 2008). The foreseeability requirement also means giving individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts)).

(b) Application of those principles to the facts of the case

38. The Court notes that the applicant's complaint is threefold. Firstly, she complained that she had not been duly informed of the results of her HIV-test; secondly, that information about her health had been disclosed by the hospital to her mother and, thirdly, to the military unit where she had served. The Court will examine these aspects in turn.

i. Whether the applicant was duly informed of her diagnosis

39. The Court notes that being informed of a diagnosis is indispensable for the person concerned to make his or her informed and independent choice regarding his or her care, support and treatment; the right to know is a fundamental ethical and legal principle, especially when there is a risk of transmission. By virtue of the domestic law the applicant was entitled to be informed of the results of her HIV test (see Section 7 of HIV act, cited in paragraph 24 above). There is no dispute between the parties on that issue. The parties disputed, however, on whether this provision had been complied with by the hospital: while the Government, relying on the conclusions of the domestic courts, alleged that the applicant had been informed of her diagnosis by the hospital staff, the applicant denied being informed of the results of her HIV-test.

40. While it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 150, 20 March 2018), the Court cannot but note that according to the HIV Act, HIV-positive person

should attest in writing of having received information about the positive results of his or her HIV tests and recommendations as to further treatment (see Section 12 of HIV act, cited in paragraph 24 above). No such written evidence had been relied on by the domestic courts and the applicant's arguments in this respect remained unanswered. Nor has such document been provided by the Government to the Court. The applicant's request for discharge from the hospital, referred to by the Government, cannot serve as such evidence as it contained no relevant elements.

41. In these circumstances, the Court cannot adhere to the domestic court's findings and concludes that there has been an interference with the applicant's right to respect for her private life on account of the hospital's failure to duly inform the applicant of the results of her HIV testing. For the reasons mentioned above, it further finds that the interference was not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention.

42. As that is the case, the Court is not required to determine whether the interference pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued (see *Y.Y. v. Russia*, no. 40378/06, § 59, 23 February 2016).

43. There has therefore been a violation of Article 8 of the Convention.

ii. Alleged disclosure to the applicant's mother

44. Although some of the circumstances in this regard have been disputed by the parties, it remains undisputed that the hospital officials provided to the applicant's mother information the applicant's HIV status (see paragraph 16 above). Regard being had to its case-law mentioned above, the Court considers that the disclosure by the hospital of confidential information about the applicant's health to her mother, whichever form it might have taken, entailed an interference with the applicant's right to respect for her private life guaranteed by Article 8 § 1 (see also *Mockutė v. Lithuania*, no. 66490/09, § 100, 27 February 2018).

45. The Court further notes that Ukrainian legislation at the relevant time imposed stringent requirements to ensure the protection of medical data (see paragraphs 23 and 24 above). Violating the rules of confidentiality of information about a person's health even constituted a criminal offence (see paragraph 22 above). Section 8 of the HIV Act, which attributed particular protection to those suffering from HIV, explicitly forbade healthcare specialists from disclosing information on a person's HIV-positive status to anyone but the person concerned. There were exceptions to the rule of non-disclosure, which included a patient's parents only in case when the patient was minor (see paragraph 24 above), which was not the applicant's situation.

46. When rejecting as unsubstantiated the applicant's complaint that releasing information on her HIV status to her mother was unlawful, the domestic courts based their conclusion on the following: (a) the applicant had

failed to prove that she had not given her oral consent for release of the information, and no written consent had been required in this regard by law; (b) the diagnosis had already been known to the applicant's mother; and (c) the release of such information to close relatives, such as parents, was aimed at providing psychological support to the applicant and was not to be seen as a disclosure of information on her diagnosis (see paragraphs 14 and 16 above). In doing so, they failed to cite any legislative provision and explain the relevance of the above findings of fact under the applicable law and its interpretation.

47. The Court observes that the HIV Act, which was primarily aimed at strictly prohibiting any unjustified disclosure of a person's HIV-status, did not provide for an exception to inform a person's HIV status by medical personnel to a relative on the basis of an oral consent given by the patient.

48. Moreover, throughout the proceedings and as well as in her application to the prosecutor the applicant consistently denied having given her consent to doctors of the hospital to discuss her state of health with anyone, including her mother. The prosecutor's and the courts' conclusion to the contrary were based exclusively on the statements of the hospital officials, who were interested persons expressly accused by the applicant of misconduct. No evidence was adduced by the domestic authorities showing why those testimonies had been taken by the courts at face value and prevailed over the applicant's allegations.

49. As regards the Government's argument that the applicant's mother was already aware of her daughter's diagnosis when she talked to the hospital officials, the Court notes that no legal basis had been cited by the domestic courts or the Government to show that that fact dispensed them from their general obligation under the law to maintain confidentiality with regard to information concerning the applicant's health.

50. In view of the foregoing, the Court finds that the release by the hospital of information about the applicant's health to her mother, whether in the form of "informing" or "confirming", did not have a Convention-compliant legal basis and was, therefore, not "in accordance with the law" within the meaning of Article 8 § 2 of the Convention. Accordingly, the Court is not required to determine whether the disclosure pursued a legitimate aim and, if so, whether it was proportionate to the aim pursued (see *Y.Y. v. Russia*, no. 40378/06, § 59, 23 February 2016).

51. There has accordingly been a violation of Article 8 of the Convention.

iii. Alleged disclosure to the military unit

52. The Court notes at the outset that the applicant's medical examination was carried out in the context of assessment of her fitness to military service. The applicant did not, as such, complain that her dismissal on health ground as a result of the examination amounted to the violation of Article 8 of the Convention. Accordingly, the Court is not called upon to make findings in

this regard but will limit its examination to the issue of the transmission of the applicant's health data to her military unit, as complained of by the applicant.

53. It has not been disputed by the Government that the results of the examination, including of her HIV-test, were passed, through the CMMC, to the military unit where the applicant served. The Government further acknowledged that the disclosure of the applicant's diagnosis constituted an interference by a public authority with the applicant's exercise of her right to private life (see paragraph 29 above). The Court is of the same view. It must therefore determine whether this interference was justified under the second paragraph of Article 8.

54. The Court previously recognised that employers may have a legitimate interest in information concerning their employees' physical health, particularly in the context of assigning them certain job functions connected to specific skills, responsibilities or competences, but underlined that collection and processing of the relevant information must be lawful and such as to strike a fair balance between the employer's interests and the privacy-related concerns of the candidate for the relevant position (see *Surikov v. Ukraine*, no. 42788/06, § 91, 26 January 2017).

55. In the present case, the domestic courts referred to the Regulation as the legal basis for processing the applicant's health data. The Court observes that the Regulation was a public document which set up specific rules governing the medical examinations of military personnel and permitted access to a military officer's health data following the examination by military medical panels and the commander of the relevant military unit, with no exceptions made to any diagnosis (see paragraph 25 above).

56. The Court observes, however, that the application of the above provisions of the Regulation to HIV diagnosis was manifestly inconsistent with the HIV Act, relied on by the applicant, which afforded special protection to HIV-positive persons and set out an exhaustive list of persons and institutions to which information on a person's HIV-positive status could be disclosed; no exception to non-disclosure was made by that law in respect of military personnel, for whatever purpose (see paragraph 24 above).

57. The Court further notes that the HIV Act had the legal force of an act of Parliament while the Ministry of Defence Order which approved the Regulation was secondary legislation and could not lawfully introduce additional limitations on the rights and obligations prescribed by law.

58. In these circumstances, it is difficult to see why the Regulation was to be understood as prevailing over the HIV Act. Neither the domestic courts in their decisions nor the Government in their observations addressed in any way this specific and important argument of the applicant which she had explicitly raised both in the domestic proceedings and before the Court.

59. Thus, even accepting that the transmission of the results of the applicant's medical examinations to the military unit had some legal basis in

domestic law, the Court finds that the ensuing inconsistency in the then applicable legislative framework on an issue as important as the disclosure of a person's HIV status, as in the present case, upset the requirement of the "quality of law" under the Convention and created a situation that was not foreseeable for the applicant within the meaning of the Court's case-law under Article 8 § 2 of the Convention (see, *mutatis mutandis*, *Shchokin v. Ukraine*, nos. 23759/03 and 37943/06, § 56, 14 October 2010; *Serkov v. Ukraine*, no. 39766/05, § 42, 7 July 2011; and *Altay v. Turkey* (no. 2), no. 11236/09, § 57, 9 April 2019).

60. It follows that the interference with the applicant's private life was not lawful for the purpose of Article 8 of the Convention.

61. Having reached that conclusion, the Court does not need to satisfy itself that the other requirements of Article 8 § 2 (legitimate aim and necessity of the interference) have been complied with.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

62. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

63. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. She submitted that HIV-positive people were amongst the most discriminated against and stigmatised in Ukraine. The disclosure of her illness to third parties had therefore adversely affected her and her quality of life.

64. The Government contested that claim.

65. Having regard to the violations found above, the Court considers that an award in respect of non-pecuniary damage is justified in this case. Making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable

B. Costs and expenses

66. The applicant also claimed EUR 3,750 for her legal representation in the proceedings before the Court, to be paid into Mr Mykhailo Tarakhkalo's bank account. To substantiate that claim she submitted a legal assistance contract of 1 February 2021 indicating an hourly rate of EUR 150. The applicant also submitted a copy of an invoice from the lawyer dated 26 February 2021, for a total of twenty-five hours' work.

67. The Government argued that, in the absence of a violation of any Convention right, no award in respect of costs and expenses was justified.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the above criteria, the documents in the Court's possession, and the fact that the applicant has already been granted EUR 850 in legal aid (see paragraph 2 above), the Court considers it reasonable to award the sum of EUR 1,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant, to be transferred directly to bank account of her lawyer, Mr. Tarakhkalo, as requested by her.

C. Default interest

69. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaints under Article 8 of the Convention concerning the hospital's failure to inform the applicant of the results of her HIV testing and the disclosure of the applicant's HIV-positive status to her mother and at her place of work admissible and the remainder of the application inadmissible;
2. *Holds*, by four votes to three, that there has been a violation of Article 8 of the Convention on account of the hospital's failure to inform the applicant of the results of her HIV testing and the disclosure of the applicant's HIV-positive status to her mother and at her place of work;
3. *Holds*, by four votes to three,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be

paid directly into the account of the applicant's lawyer,
Mr M. Tarakhkalo;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 September 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik
Registrar

Síofra O'Leary
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges O'Leary, Chanturia and Bårdsen is annexed to this judgment:

S.O.L.
V.S.

JOINT DISSENTING OPINION OF JUDGES O’LEARY,
CHANTURIA AND BÅRDSSEN

1. A case like the present one could raise important issues relating to consent to HIV tests performed in the context of routine medical checks related to employment and limits to disclosure of the results of such tests to third parties, including the employer.

2. We regret that, for the reasons explained below, we are unable to join the majority and find a series of violations of Article 8 of the Convention on the basis of reasoning which, in places, is quite far-reaching.

3. We agree entirely with the majority (see paragraphs 34 -35 of the judgment) that an individual’s health constitutes a key element of private life.¹ We also agree that respecting the confidentiality of health data is a vital component in the legal systems of all the Contracting Parties to the Convention.² These considerations are particularly important as regards protection of the confidentiality of information about a person’s HIV status, not least given the stigma which may have attached or still attach in certain societies to that illness.³

4. A general reading of the case might also point to certain weaknesses regarding how regulations, regulatory authorities and individual employers in Ukraine deal with sensitive medical data or did so at the material time.

5. However, the Court is bound to examine the complaints as submitted by applicants, which complaints consist of two elements: factual allegations and legal arguments. The requirement of exhaustion of domestic remedies, which was respected in this case, ensures that the Court benefits from the factual and legal assessment performed by one or several domestic courts and prevents the Court acting as a first or fourth instance.

6. In the present case, between 2008 and 2012, the applicant submitted her case for examination by the military prosecutor’s office, the Primorskyi District Court of Odessa, the Odesa Regional Court of Appeal and the Higher Specialised Civil and Criminal Court. After due consideration, these domestic courts held that the applicant:

- had consented to the HIV test, having signed the written consent form;
- had been duly informed about the results of her HIV test based on the consent form in combination with her request to be discharged;

¹ *L.L. v. France*, no. 7508/02, ECHR 2006 XI; *Radu v. the Republic of Moldova*, no. 50073/07, 15 April 2014; *L.H. v. Latvia*, no. 52019/07, 29 April 2014, § 56; *Konovalova v. Russia*, no. 37873/04, 9 October 2014, §§ 27, 41; *Y.Y. v. Russia*, no. 40378/06, 23 February 2016, § 38; *Surikov v. Ukraine*, no. 42788/06, 26 January 2017; *Frâncu v. Romania*, no. 69356/13, 13 October 2020, § 52.

² *L.L. v. France*, cited above, §§ 44-45.

³ *Z v. Finland*, 25 February 1997, *Reports of Judgments and Decisions 1997*, § 96; *Kiyutin v. Russia*, no. 2700/10, ECHR 2011, § 64; *Armonienė v. Lithuania*, no. 36919/02, 25 November 2008, § 40; *Biriuk v. Lithuania*, no. 23373/03, 25 November 2008, § 39; *I. v. Finland*, no. 20511/03, 17 July 2008, § 38; *C.C. v. Spain*, no. 1425/06, 6 October 2009, § 33; *P.T. v. the Republic of Moldova*, no. 1122/12, 26 May 2020, §§ 5-6, 26.

- had not provided sufficient evidence to prove that she had not consented to the diagnosis being disclosed to her parents or, in certain circumstances, to a third party such as her employer.

7. It is a fundamental feature of the machinery of protection established by the Convention that the national systems themselves should provide redress for breaches of its provisions, with the Court exercising a supervisory role subject to the principle of subsidiarity.⁴ Where the highest domestic court has concluded that there was no evidence which could call into question the lower courts' conclusions regarding the unsubstantiated nature of the applicant's claims (see paragraph 18 of the judgment), the Court should only reach the opposite conclusion if it considers that the domestic court assessments are manifestly unreasonable or arbitrary.⁵

8. Neither is the Court a court of fourth instance. Its power to review compliance with domestic law is limited as it is in the first place for the national authorities, notably courts, to interpret and apply domestic law. This is particularly true when, as in this instance, the majority decides to frame the case with reference to the hierarchy of domestic norms, without, it would appear from the file, a complete picture of all the relevant norms having been available.⁶

9. It is not the Court's function to deal with errors of fact or law allegedly committed by a national court or to substitute its own assessment for that of the national courts or other national authorities unless and in so far as they may have infringed rights and freedoms protected by the Convention.⁷ In other words, the Court does not question the assessment of the domestic authorities unless there is "clear evidence of arbitrariness".⁸

10. A number of features of the present case are striking. First, finding a violation in this case required the Court to establish a set of facts different from that found by the domestic courts based on the applicant's version of events. However, the applicant's factual allegations – which were at variance with the findings of the domestic courts – also varied between her application and her response to the Government's observations (see paragraph 10 of the judgment). The applicant even disputed the submissions of her mother, who claimed to have been informed about her HIV results by the applicant's partner prior to having this confirmed by one of the hospital doctors. According to the applicant, however, her mother had no prior knowledge of her condition before it was disclosed by hospital staff (*ibid.*, paragraph 17). It appears that the applicant's partner refused to testify. Central to the

⁴ *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 103, ECHR 2001-V

⁵ See, for example, *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009, § 174.

⁶ *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018, § 150; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I.

⁷ Article 19 ECHR. See, for example, *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I; *Perez v. France* [GC], no. 47287/99, § 82, ECHR 2004-I; *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017, § 170.

⁸ See, for example, *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, ECHR, § 89.

applicant's legal arguments regarding absence of consent and information and unlawful disclosure were the establishment of these relevant facts. Second, it is striking that the majority is willing to accept certain factual elements as established by the domestic courts (not least the crucial question of consent in relation to which the applicant's version of events is rejected in paragraph 31 of the judgment) but not others (see paragraph 40 on the question whether the applicant had been duly informed). Given the extent to which the facts were in dispute and the level of inconsistency in the applicant's version, it is difficult to see why the Court considered itself to be in a better position than the domestic courts and why it was considered that the manifestly unreasonable and arbitrary threshold was reached in this case.

11. We agree with the majority that the disclosure of sensitive medical data such as that forwarded confidentially to the applicant's military unit by the medical military commission could raise issues under Article 8 of the Convention in relation to an employee's right to privacy. However, the question of what the applicant consented to when she underwent medical tests mandated by her employment contract remains of central importance regarding this aspect of her Article 8 complaint. Yet her allegations regarding consent have not been accepted. Furthermore, it appears to us that the majority have embarked on their own interpretation of domestic law and the interaction between the regulation on military medical assessments and the HIV act (see paragraphs 55 – 58 of the judgment), unguided by relevant domestic case-law on one or other act and their relationship and in the absence of answers to specific questions addressed to the Government which would have enabled the Court to engage fully and carefully with any lawfulness problems which might have arisen in the applicant's case.

12. Due to the factual allegations and legal complaints presented by the applicant and the inconsistencies therein and with reference to the material available to the Court, we are not in a position to conclude that it was manifestly unreasonable or arbitrary for three levels of domestic courts to conclude that the applicant's complaints were unsubstantiated.