



Conditions of detention of suspect in Caruana Galizia assassination amid Covid-19 pandemic did not breach the European Convention

The applicant in the case of [Fenech v. Malta](#) (application no. 19090/20) is a businessman who was arrested, in November 2019, on suspicion of involvement in the murder of Maltese journalist Daphne Caruana Galizia in October 2017 and has since then been remanded in custody.

The case concerned his conditions of detention in the Corradino Correctional Facility and whether the Maltese authorities took adequate measures to protect him from contracting Covid-19 whilst in prison, in particular because he has only one kidney.

In today's **Chamber** judgment¹ the European Court of Human Rights held, unanimously, that there had been **no violation of Article 3 (prohibition of inhuman or degrading treatment)** of the European Convention on Human Rights in relation to the applicant's detention while he was segregated.

The Court found in particular that the applicant's period of segregation from others – due to having tested positive for cocaine – had lasted for no longer than 35 days; he had not suffered any harmful psychological or physical effects as a result, and the restrictions applied had not amounted to complete sensory isolation.

It also held unanimously that there had been **no violation of Article 3** of the European Convention in relation to the conditions of detention later in the dormitory.

There had been no overcrowding, and as for the other restrictions that Mr Fenech complained of, the Court considered that they had occurred within a very specific context, namely during a public health emergency, and had been introduced for important health reasons. Moreover, they had been imposed not only on the applicant but on society at large. Given the exceptional and unforeseeable context related to the Covid-19 pandemic, those measures, which were proportionate and restricted in time, could not be considered to have caused him greater distress or hardship than was unavoidable during detention in a pandemic.

The Court also held that there had been **no violation of Article 3 in relation to the State's obligation to preserve his health and well-being**.

It considered that the authorities had put in place relevant measures and had been vigilant in adapting their protocols to the evolving situation. While provision should be made to allow prisoners at highest risk to be separated from others, Mr Fenech had not shown that he fell within the category of the most vulnerable. The fact that he shared a dormitory and used the same medical, sanitary, catering and other facilities with other non-Covid-19-infected detainees did not in itself raise an issue under Article 3.

Principal facts

The applicant, Yorgen Fenech, is a Maltese national who was born in 1981. He is currently detained in the Corradino Correctional Facility in Paola (Malta).

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Mr Fenech is a businessman and the former head of the Tumas Group. He was arrested on his yacht on 20 November 2019 on suspicion of involvement in the murder of Maltese journalist Daphne Caruana Galizia in October 2017.

On 30 November 2019 he was arraigned and charged with promoting, organising or financing an organisation with a view to committing a criminal offence, and of complicity in wilful homicide. He pleaded not guilty to the charges and has been remanded in custody since that date. Having tested positive for substance abuse on arrival in the prison, he was placed in a single cell with limited contact, before being moved to a dormitory on 4 January 2020.

Mr Fenech considered that his conditions of detention were unsanitary and unhealthy. In particular he complained of overcrowding, insalubrious conditions, lack of clean and warm clothing, and very limited physical exercise. As a result of the Covid-19 public-health crisis, he felt that the State failed to take adequate measures to protect him from contracting Covid-19 whilst in prison even though his medical condition – the previous loss of a kidney – placed him at increased risk and that his chances of overcoming Covid-19 were diminished.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, the applicant complained about his conditions of detention and that the State failed to take adequate measures to protect him from contracting Covid-19 whilst in prison, in particular with regard to his vulnerable health status.

The application was lodged with the European Court of Human Rights on 6 May 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Péter **Paczolay** (Hungary), *Judge*,
 Krzysztof **Wojtyczek** (Poland),
 Alena **Poláčková** (Slovakia),
 Gilberto **Felici** (San Marino),
 Raffaele **Sabato** (Italy),
 Lorraine **Schembri Orland** (Malta),
 Ioannis **Ktistakis** (Greece),

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

Article 3 (prohibition of inhuman or degrading treatment)

In relation to Mr Fenech's period in isolation, the Court reiterated that removal of contact with other prisoners for security, disciplinary or protective reasons did not in itself amount to inhuman treatment or degrading punishment. The reason, conditions, duration and stringency of the measure and the effects on the prisoner had to be taken into consideration.

In this case, the Court considered that the isolation measure had been taken for medical reasons and protective purposes in line with the correctional facility's policy that anyone testing positive for substance abuse was not allowed to mix with other inmates until they tested negative, coupled with the need to ensure Mr Fenech's safety.

The Government had not indicated a legal basis for the measure, and the Court considered that the applicant should have been notified of the decision, and the details pertaining to it, in writing at the time. However, the decision had been based on a thorough physical and psychological medical

assessment and on the resulting medical recommendations. Moreover, Mr Fenech had been informed orally and he had not claimed that he was not aware of the policy; nor did he question its necessity, or the fact that he had tested positive for cocaine.

The Court underlined, however, that if any risk factors (self-harm/suicide/harming others) had been identified following an individual assessment (as opposed to an automatic conclusion in drug use cases), medical follow-up to monitor that risk would have been necessary. It was concerned that particularly vulnerable inmates could be at risk in such a situation, and emphasised that isolation measures required regulation, monitoring and strict adherence to medical protocols to safeguard against such risks.

Of importance was the fact that Mr Fenech's isolation had lasted for no longer than 35 days; he had not suffered any harmful psychological or physical effects as a result; and the restrictions applied had not amounted to complete sensory isolation. Having examined the actual conditions in his single occupancy cell, the Court did not find that he had been held in conditions in breach of Article 3.

There had therefore been no violation of Article 3 in relation to the period of isolation.

In relation to the period in the dormitory, as Mr Fenech had an individual place to sleep and 4.5 sq. m. of personal space and could thus move around normally, and as his other material complaints were considered to be unfounded, the Court held that his living conditions did not constitute inhuman or degrading treatment.

As to the restrictions that Mr Fenech complained of, including no access to the gym, to his family, to church or other activities, the Court considered that they had occurred within a very specific context, namely during a public health emergency, and had been introduced for significant health reasons. Moreover, they had been imposed not only on the applicant but on society at large. Given the exceptional and unforeseeable context related to the Covid-19 pandemic, those measures, which were proportionate and restricted in time, could not be considered to have caused him greater distress or hardship than was unavoidable during detention in a pandemic. There had therefore been no breach of Article 3 of the Convention in that respect.

Article 2 (right to life) taken with Article 3

The Court did not exclude the applicability of Article 2 in certain Covid-19 related cases. However, in the circumstances of this case, it considered that the provision was not applicable. Indeed, more than a year and a half after the start of the pandemic, Mr Fenech had not been infected and vaccination had been made available to him as early as April 2021. In any event, even if he were to contract Covid-19, he had not provided any studies or relevant materials that gave a clear picture of the chances that a man of his age (early forties), lacking a kidney, would certainly or quite likely die of the disease, were he to be infected (pre- or post-vaccination).

Regarding the obligation of States to adequately ensure the health and wellbeing of prisoners under Article 3, the Court considered that given the nature of Covid-19, the authorities had to put certain measures in place aimed at avoiding infection, limiting the spread of Covid-19 inside the prison, and providing adequate medical care in the case of infection. Preventive measures had to be proportionate to the risk but could not be too onerous on the authorities who were confronted with a novel situation such as a global pandemic.

After the outbreak of Covid-19, the prison had effectively been put into lockdown, whereby visitors of all kinds were not allowed in and the staff worked weekly shifts to avoid excessive exposure to outside factors. The Court considered that those measures had certainly diminished the risk of wide-spread contamination within the prison thus preserving the health and safety of inmates and staff.

General measures had also been put in place such as regular disinfection, cleaning, mask wearing, provision of hand sanitiser and temperature checks for prisoners and prison guards alike. Rapid tests, with immediate results, were carried out when determining where any new detainees would

be placed, and PCR tests and quarantine periods had also been put in place, with the duration of the latter decreasing over time. In the Court's view, this showed that the authorities had been vigilant in adapting their protocols to the evolving situation. Importantly vaccination against Covid-19 had been rolled-out within the prison in a very timely manner.

In so far as Mr Fenech complained that, in light of his medical condition, he should have been protected from exposure more than other detainees, the Court noted that he was not the only prisoner who qualified as vulnerable. Given the practical demands of imprisonment and the novelty of the situation, the Court accepted that it might not have been possible to make arrangements for each one of them to be moved to safer quarters before any outbreak of infection in the prison. While provision should be made to allow prisoners at highest risk to be separated from others, Mr Fenech had not shown that he fell within the category of the most vulnerable. The fact that he shared a dormitory and used the same medical, sanitary, catering and other facilities with other non-Covid-19-infected detainees did not in itself raise an issue under Article 3.

The Court considered that the authorities had put in place adequate and proportionate measures in order to prevent and limit the spread of the virus. Moreover, even assuming that Mr Fenech were to contract Covid-19 in prison, there was no indication that qualified assistance would not be available.

There had therefore been no breach of Article 3.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.